TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 1189

DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD. AND DIAMOND TRADING COMPANY, LTD., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR CERTIORARI FILED APRIL 23, 1945.

CERTIORARI GRANTED APRIL 23, 1945.

Supreme Court of the United States

OCTOBER TERM, 1944

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DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD., DIAMOND TRADING COMPANY, LTD., ET AL.,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

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District Court of the United States

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action File No. 29-446

UNITED STATES OF AMERICA,
Plaintiff,

v.

DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD., DIAMOND TRADING COMPANY, LTD., SOCIETE GENERALE DE BELGIQUE, SOCIETE MINIÈRE DU BECEKA, SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO, COMPANHIA DE DIAMANTES DE ANGOLA, CONSOLIDATED AFRICAN SELECTION TRUST, LTD., SIERRA LEONE SELECTION TRUST, LTD., RUSSELL JOHNSON PARKER, LUTE J. PARKINSON, HERBERT H. VREELAND, ALBERT E. THIELE, SOLOMON R. GUGGENHEIM, CLENDENIN J. RYAN, AND GEORGE K. STURM,
Defendants.

SUMMONS

To the above named Defendants:

You are hereby summoned and required to serve upon Lawrence S. Aspey, Herbert A. Berman, Patrick A. Gibson, and Edward S. Stimson, Special Assistants to the Attorney General, plaintiff's attorneys, whose address Fourteenth Floor, 30 Broad Street, New York 4, New York, an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[s] GEORGE H. FOLLMER
Clerk of Court

[SEAL OF COURT]

Date: January 29, 1945.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,

v.

DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD., DIAMOND TRADING COMPANY, LTD., SOCIETE GENERALE DE BELGIQUE, SOCIETE MINIERE DU BECEKA, SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO, COMPANHIA DE DIAMANTES DE ANGOLA, CONSOLIDATED AFRICAN SELECTION TRUST, LTD., SIERRA LEONE SELECTION TRUST, LTD., RUSSELL JOHNSON PARKER, LUTE J. PARKINSON, HERBERT H. VREELAND, ALBERT E. THIELE, SOLOMON R. GUGGENHEIM, CLENDENIN J. RYAN, AND GEORGE K. STURM,
Defendants.

Civil No. 29-446

COMPLAINT—FILED, JANUARY 29, 1945

The United States of America, Plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this action against the defendants and complains and alleges as follows:

I.

JURISDICTION AND VENUE

1. This complaint is filed and this action is instituted against the defendants under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies" commonly known as the Sherman Antitrust Act, and under the Act of Congress of August

27, 1894, c. 349, Sec. 74, 28 Stat. 570, as amended, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes" commonly known as the Wilson Tariff Act, in order to prevent and restrain continuing violations by defendants, as hereinafter alleged, of Sections 1 and 2 of the Sherman Act and Section 73 of the Wilson Tariff Act.

2. All of the corporate defendants do business in the United States and more particularly transact business in the Southern District of New York, have done so continuously for many years, and are found therein. Companhia de Diamantes de Angola (hereinafter called Diamang) has an office in the Southern District of New York. The individual defendants, Herbert H. Vreeland, Albert E. Thiele, Lute J. Parkinson, and Russell Johnson Parker reside in the Southern District of New York.

II.

DEFENDANTS

Corporate Defendants

3. De Beers Consolidated Mines, Ltd. (hereinafter called De Beers), a corporation organized in 1888 under the laws of the Colony of the Cape of Good Hope, South Africa, and now existing under the laws of the Province of the Cape of Good Hope, Union of South Africa, with an office and principal place of business at 36 Stockdale Street, Kimberley, Cape of Good Hope, Union of South Africa, is made a defendant.

4. Diamond Corporation, Limited (hereinafter called Diamond Corporation), a corporation organized in 1930 and now existing under the laws of the Union of South Africa, with its principal office and place of business at Kimberley, Cape of Good Hope, Union of South Africa, is made a defendant. De Beers owns 80% of its outstanding stock and the

remaining 20% is owned by Consolidated Diamond Mines of South West Africa, Limited (hereinafter called Consolidated Diamond Mines).

5. Diamond Trading Company, Limited (hereinafter called Diamond Trading Company) a corporation organized in 1934 and now existing under the laws of the Union of South Africa with its principal office and place of business in London, England, and an office and place of business in Kimberley, Cape of Good Hope, Union of South Africa, is made a defendant. De Beers and Diamond Corporation each own 50% of its stock.

6. Societe Generale de Belgique (hereinafter called Societe Generale), a corporation organized about 1903 (as a successor to corporations organized in 1822 and 1830), and now existing under the laws of the Kingdom of Belgium, is made a defendant. It owns approximately 3500 of the approximately 5000 industrial enterprises in Belgium and more than 50% of the mining, power, and raw materials industries of the Belgian Congo. It owns 77% of the 40,000 outstanding shares of the corporation designated below as Beceka and owns stock in Forminiere and Diamang.

7. Societe Miniere du Beceka (hereinafter called Beceka), a corporation organized in 1919 and now existing under the laws of the Belgian Congo, is made a defendant. It owns deposits which are the principal source of the world's industrial diamonds.

8. Societe Internationale Forestiere et Miniere du Gongo (hereinafter called Forminiere), a corporation organized in 1906 and now existing under the laws of the Belgian Congo, with its principal office and place of business at Tshikapa, Belgian Congo, is made a defendant. It works the diamond deposits owned by Beceka and is the largest producer of diamonds in the Belgian Congo. Ninety-eight per cent of the diamonds it produces are industrial diamonds.

9. Diamang, a corporation organized in 1917 and now existing under the laws of Portugal, with its principal office at Lisbon, Portugal, is made a defendant. It produces substantially all diamonds mined in Portuguese Angola.

10. Consolidated Africa Selection Trust, Limited (hereinafter called Consolidated Selection), a corporation organized in 1924 and now existing under the laws of the United Kingdom, is made a defendant. It owns extensive diamond producing properties and is the largest diamond producer in the Gold Coast.

11. Sierra Leone Selection Trust, Limited (hereinafter called Sierra Selection), a corporation organized in 1934 and now existing under the laws of the United Kingdom, is made a defendant. It is a wholly owned subsidiary of Consolidated Selection and produces practically all diamonds that are produced in Sierra Leone.

Individual Defendants

12. Herbert H. Vreeland, a resident of New York City, is made a defendant. He is now and since before 1924 has been a stockholder and director of both Forminiere and Diamang.

13. Albert E. Thiele, a resident of Scarsdale, New York is made a defendant. He is a stockholder and director of both Formienere and Diamang.

14. Solomon R. Guggenheim, a resident of Port Washington, Long Island, New York, is made a defendant. He is now and since before 1923 has been a stockholder in Forminiere and Diamang.

15. Clendenin J. Ryan, a resident of Hackettstown, New Jersey, is made a defendant. He is and since before 1923 has been a stockholder of Formienere and Diamang.

16. George K. Sturm, a resident of Woodbridge, New Jersey, is made a defendant. He is a stockholder and auditor of Forminiere.

17. Herbert H. Vreeland, Albert E. Thiele, Solomon R. Guggenheim, Clendenin J. Ryan and George K. Sturm are the American stockholders of Forminiere. They hold stock therein under a voting trust agreement called the Congo Mines Participation Agreement. The interests and voting rights in Forminiere so held by said individual defendants are substantial, and they acting together with Societe Generale control Forminiere.

18. Lute J. Parkinson, a resident of New York City, is made a defendant. He is now and for many years has been assistant general manager and an agent of De Beers.

19. Russell Johnson Parker, a resident of New York City, is made a defendant. He is now and since before 1925 and 1934, respectively, has been managing director of Consolidated Selection and Sierra Selection.

20. Each of the individual defendants has participated and now participates in the direction and management of the defendant corporations employing him or of which he is an officer or stockholder, and particularly in those corporate affairs, policies, and acts described in this complaint. Each of the individual defendants has authorized, ordered, or done some or all of the acts done by his corporation constituting the offenses hereinafter complained of.

III.

The Trade and Commerce Involved

Importance of Industrial Diamonds

21. The diamond is the hardest known substance and a strategic war and industrial material. Diamonds and bort,

a diamantine substance containing impurities, are used in cutting, grinding, and boring hard materials such as metals, stone, etc. They are more effective than other cutting or abrasive materials where speed and precision are required. Being harder, they are used for trueing other cutting materials. Particular uses of diamonds include the following: Diamond drills, saws, shaping tools, gear grinders, thread grinders, and wire drawing dies are used in making gun sights, bombsights, binoculars, compasses, chronometers, gauges, radio wire, magnetos, dynamos, transformers, electric motors, and pistons and crankshaft bearings for airplane motors. Diamond tools are used to true the abrasive wheels used in making crankshafts, camshafts, valves and connecting rods, and to true the tungsten carbide tools used in the manufacture of shells.

22. Where hereinafter used, the term diamonds, unless otherwise specified, refers to rough diamonds, including uncut gem diamonds, industrial diamonds and bort.

Sources of Industrial Diamonds and Bort

23. The diamonds which are used in industry are those diamonds not suitable for use as gems because of impurities and imperfections. Industrial diamonds come from both pipe mines and alluvial deposits and are mined together with gem diamonds from these sources. Industrial diamonds are the residue after the gem stones have been sorted out. The earlier important commercial sources of diamonds were pipe mines; all pipe mines of any importance are located in the Union of South Africa. After 1914, the other commercial source of diamonds, alluvial deposits, were discovered in the Belgian Congo, Portuguese Angola, Gold Coast, and Sierra Leone. There are minor alluvial deposits in other parts of Africa and in South America.

24. Eighty per cent by weight of the world's production of diamonds is used for industrial purposes. Ninety-eight

per cent by weight of the Belgian Congo, sixty per cent of the Gold Coast and Sierra Leone, fifty per cent of the South African, and forty per cent of Angola production of diamonds are suitable for industrial uses only.

Ownership and Control of Diamond Deposits

25. De Beers, directly or through subsidiaries, has acquired and now owns all of the important pipe mines in Africa and thus controls all pipe mines of any importance. De Beers directly or through subsidiaries also has acquired many less important pipe mines with the sole intent and purpose of closing them down so as to keep their production off the market; upon acquisition operations at these mines were discontinued and have never been renewed.

26. De Beers has also acquired and now controls the principal alluvial diamond mining companies of South Africa. It purchased the stock of Cape Coast Exploration Company, Limited, liquidated the company, and took over its assets. De Beers purchased 41% of the stock of Consolidated Diamond Mines of South West Africa, Limited (hereinafter called Consolidated). Anglo American Investment Trust, Limited, owns some stock in Consolidated. Ernest Oppenheimer is chairman of the boards of De Beers, Anglo American, and Consolidated.

27. The Belgian Congo diamond deposits are owned by Beceka and other subsidiaries of Societe Generale. Forminiere mines these deposits under contracts with the owning companies. Diamond deposits in Portuguese Angola are owned and operated by diamang. Gold Coast, Sierra Leone, and certain other African diamond deposits are owned and mined by Consolidated Selection an its subsidiaries, including Sierra Selection.

28. The defendant corporations and their subsidiaries produce and sell approximately 99% of all the diamonds

produced in Africa, and approximately 95% of all the diamonds produced in the world.

Market in the United States

29. The principal market for industrial as well as gem diamonds is in the United States. In 1942 and 1943 imports of all diamonds and of industrial diamonds into the United States were in excess of the world's production of all diamonds and of industrial diamonds, respectively, in those years. There is a continuous stream of diamonds and boart from Africa to England, and thence to the United States. This stream of shipments is a part of the foreign trade and commerce of the United States.

IV.

THE VIOLATIONS OF LAW

30. For many years up to and including the date of the filing of this complaint, defendants have been continuously and now are engaged in a combination and conspiracy to restrain and monopolize trade and commerce of the United States with foreign nations in gem diamonds, industrial diamonds, and boart, and have been and now are parties to contracts, agreements, and understandings in restraint of trade and commerce of the United States with foreign nations, all in violation of Sections 1 and 2 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Antitrust Act. Continuously during said period defendants, some of whom were engaged in importing, have been and now are engaged in a combination and conspiracy in restraint of, and have been and now are parties to contracts and agreements intended to operate in restraint of, lawful trade and free competition in lawful trade and commerce of the United States, and intended to increase the market price in the United States of diamonds, industrial diamonds, and boart

imported into the United States, all in violation of Section 73 of the Act of Congress of August 27, 1894, c. 349, 28 Stat. 509, as amended, commonly known as the Wilson Tariff Act. Defendants are continuing and threaten to and will continue said offenses unless the relief hereinafter prayed for in this complaint is granted.

31. The aforesaid combination and conspiracy alleged in the next preceding paragraph have consisted of a continuing agreement and concert of action between defendants: (a) to prevent dealers and consumers in the United States from purchasing diamonds from the producers, (b) to prevent all sale or purchase of diamonds for export to or import into the United States except by purchase through Diamond Trading Company and except subject to terms and conditions set by defendants; (c) to prevent all persons in the United States other than certain favored brokers, dealers, and cutters from purchasing diamonds from the Diamond Trading Company, (d) to limit the production and supply of diamonds, (e) to limit and restrict the quantity of diamonds imported into the United States, and (f) to fix, stabilize, and enhance the prices at which diamonds are sold in the United States.

32. Defendants have formed and carried out the aforesaid combination and conspiracy by the acts, conduct, and agreements in this complaint described and alleged.

33. The defendants have controlled the marketing of diamonds in the United States and in other countries principally by causing substantially all diamonds produced in Africa to be sold through a single selling agency. Until 1934 that selling agency was a group of London merchants known as the Diamond Syndicate and after 1934 and continuing to the present time it has been Diamond Trading Company. The defendants now cause the Diamond Corporation and the South African Producers Association to acquire from sub-

stantially all the producers in Africa all diamonds sold by them and to resell the diamonds so acquired to the Diamond Trading Company exclusively. By these means the defendants obstruct and impede the free flow of diamonds to the United States from the producers or purchasers from them, prevent substantially all purchases of diamonds for export to or import into the United States except by purchase through Diamond Trading Company and except in accordance with terms and conditions set by defendants, and monopolize the sale of diamonds exported to or imported into the United States. The aforesaid arrangements which defendants have used to control the sale of diamonds in the United States and other markets have varied from time to time as hereinafter more fully alleged.

34. Prior to 1920 the producers of diamonds in the Union of South Africa and the Mandate of Southwest Africa (who are hereinafter sometimes collectively referred to as the Conference Producers) agreed with each other to monopolize the supply of diamonds to world markets. For this purpose they formed an association known as the Conference and agreed with each other to limit their production and to sell their diamonds exclusively to a single selling agency, a group of London merchants known as the Diamond Syndicate. All important diamond deposits then being worked were owned or controlled by the Conference Producers.

35. Defendant De Beers is now and was for many years prior to 1920 the most important Conference Producer, controlling the great bulk of the diamond deposits in the areas worked by them and exercising a dominant influence in bringing about and maintaining the agreements above referred to. Other Conference Producers include New Jagersfontein and Premiere, both now wholly owned by De Beers, and Consolidated Diamond Mines, which De Beers controls and of whose capital stock De Beers owns 41%.

36. The agreements mentioned in paragraph 34 above were maintained in effect until 1930 when they were replaced with further means to control the production and marketing of diamonds sold by the Conference Producers as hereinafter described.

37. After 1920 there were no further discoveries of important diamond deposits in the Union of South Africa and the Mandate of Southwest Africa. In the Belgian Congo, Portuguese Angola, Sierra Leone, and the Gold Coast, however, previously undeveloped alluvial deposits of great importance came into production from time to time between 1920 and 1930. These deposits are especially rich in industrial diamonds and constitute the principal source of the world's supply of industrial diamonds.

38. In order to maintain the control first established by the Conference Producers over the world market for diamonds, including the United States market, which is the largest and most important diamond market, and to maintain high prices for diamonds, both gem and industrial, throughout the world, defendants have continuously eliminated all competition between the Conference Producers and the companies who between 1920 and 1930 came into production in Africa outside of the Union of South Africa and the Mandate of Southwest Africa. Among this later group of producers (hereinafter sometimes collectively referred to as the non-Conference Producers), the most important are defendants Becceka, Forminiere, Diamang, Consolidated Selection, and Sierra Selection and its subsidiaries. Becceka owns and Forminiere operates the richest diamond mine in the world; over 90% of its production by weight consists of industrial diamonds.

39. For the purposes alleged in paragraph 38 above, from time to time as the non-Conference Producers came into production the Conference Producers and the Diamond Syndi

cate purchased diamonds from them in large quantities, and as each non-Conference Producer became of importance in diamond production defendants have caused it to enter into contracts with the Diamond Syndicate requiring each such producer to sell its diamonds of all kinds exclusively to the Syndicate. Thus the Syndicate contracted to purchase all diamonds of Diamang in 1923, of Consolidated Selection in 1925, and of Forminiere in 1926. Alluvial deposits were discovered in Lichtenburg and Namaqualand, South Africa, in 1926 and 1927. They were rapidly developed and from 1927 to 1930 they produced large quantities of diamonds and were exhausted. The Syndicate acquired a large part of these diamonds. The aforesaid exclusive purchase contracts between the Diamond Syndicate and Diamang, Forminiere, and Consolidated Selection, as well as such contracts made by the Syndicate with the other non-Conference Producers, were extended and renewed and maintained continuously in effect and carried out until 1930 when they were replaced as hereinafter described.

40. The Diamond Syndicate and the Conference Producers kept off the market most of the diamonds purchased by them as above described and thus accumulated large stocks which the Diamond Syndicate marketed only from time to time and in a manner designed to maintain high prices for diamonds throughout the world.

41. The depression which began in 1929 made it difficult for the Syndicate to finance the extensive purchase agreements above-mentioned and the carrying of the large stocks of diamonds accumulated and held off the market as aforesaid. In order to relieve the Syndicate and avoid an uncontrolled market, the Conference Producers purchased one-half of the Syndicate's stocks on hand as of July 1, 1929.

42. Thereafter, further to assist in financing the aforesaid purchases of diamonds and the carrying of stocks there-

of, and to reduce the participation of the Diamond Syndicate in defendants' system of control of the production and marketing of diamonds, defendants in 1930 formed the Diamond Corporation and caused it to take over from the Conference Producers their aforesaid stocks of diamonds and caused it also to take over from the Diamond Syndicate the latter's aforesaid exclusive purchase contracts, referred to in paragraphs 34 and 39, respectively, with each of the Conference Producers and non-Conference Producers. De Beers and Consolidated Diamond Mines acquired and now own 80% and 20%, respectively, of the stock of Diamond Corporation.

43. From 1930 to about 1933 defendants caused Diamond Corporation to maintain exclusive selling agreements with the Diamond Syndicate and accordingly Diamond Corporation during this period sold its diamonds, which included all diamonds sold by both the Conference Producers and the non-Conference Producers and such amounts as have been marketed from time to time out of the aforesaid accumulated stocks taken over by Diamond Corporation, exclusively to the Diamond Syndicate.

44. In or about 1933 defendants modified their system of control by forming the South African Producers Association, Limited (hereinafter called the Producers Association) and by causing all of the Conference Producers to terminate their contracts with Diamond Corporation and to become members of the Producers Association and to enter into contracts with it by which they agreed to sell their diamonds exclusively to it. Diamond Corporation continued its contractual arrangements with the non-Conference Producers whereby they sold their diamonds exclusively to it. Diamond Corporation, however, became a member of the Producers Association and entered into contracts with it by which Diamond Corporation agreed to sell its diamonds exclusively to the Producers Association. The Producers Association which thus acquired the diamonds of all the companies contracted to sell the dia-

monds so acquired by it exclusively to the Diamond Syndicate.

45. In or about 1934 defendants completed the concentration of marketing control in their own hands and eliminated the Diamond Syndicate from its previous share in control. For this purpose and to carry out more effectively the purposes hereinbefore alleged defendants formed Diamond Trading Company (of whose capital stock De Beers and Diamond Corporation each took 50%) and caused it to take over from the Diamond Syndicate the latter's exclusive purchase contracts with the Producers Association. Thereby Diamond Trading Company replaced the Diamond Syndicate as the exclusive selling agency for all diamonds produced by the Conference Producers and the non-Conference Producers. Diamond Trading Company renewed and maintained in effect such exclusive purchase contracts with the Producers Association continuously until the present time, with the revision as to industrial diamonds in 1943 as hereinafter described.

46. Under the contracts mentioned in the last preceding paragraph, Diamond Trading Company and the Producers Association have agreed from time to time upon the quantities of diamonds that the former buys from the latter. In turn the agreements between the Producers Association and its members, including Diamond Corporation, provide that the members sell to the Association in such amounts as to replace the diamonds disposed of to world markets by Diamond Trading Company. The members of the Producers Association have from time to time agreed among themselves upon individual quotas to be sold to it by the respective members in filling the total amounts to be sold by it to Diamond Trading Company. Diamond Corporation, in filling its individual quota of sales to the Producers Association, has agreed from time to time with each of the non-Conference Producers upon the individual quotas to be sold by each of them to Diamond Corporation. By these quota restrictions

defendants have limited both the production and the marketing of both gem and industrial diamonds by Conference Producers and by non-Conference Producers.

47. In 1943 defendants modified the aforesaid selling agreements to change the course of sale of industrial diamonds. Diamond Corporation no longer sells to the Producers Association the industrial diamonds which Diamond Corporation acquires from the non-Conference Producers but instead purchases from the Producers Association all industrial diamonds which the Producers Association purchases from Conference Producers, and Diamond Corporation now sells industrial diamonds so acquired from both Conference Producers and non-Conference Producers directly to the Diamond Trading Company. The Producers Association continues to sell to Diamond Trading Company all gem diamonds of the Conference Producers and non-Conference Producers in accordance with the agreement alleged in paragraph 45.

48. As a result of the revision of the aforesaid selling agreement the individual quotas allocated to each producer apply only to their sales of gem diamonds, but the quota limitations upon the amount of gem diamonds to be sold by each producer has nevertheless continued to limit the production of industrial diamonds and boart. Gem diamonds are mined in no greater amounts than are to be sold under the selling agreements and industrial diamonds and boart are not mined separately from gem diamonds but only coincidentally therewith since gem diamonds, industrial diamonds, and boart are scattered through the same ore. For 1943 the agreed percentage sales quotas for gem diamonds allocated to the members of the Producers Association were: 20% for Diamond Corporation, 47% for De Beers, 17.5% for Consolidated Diamond Mines, and 15.5% for the Union of South Africa. Premiere and New Jagersfontein were not

operating, and their quotas were assigned to Diamond Corporation.

49. In consequence of the arrangements aforesaid, Diamond Trading Company now controls the purchase and resale of all diamonds of all kinds mined by the Conference Producers and non-Conference Producers and is the sole selling agency for 99% of all diamonds produced in African and 95% of all diamonds produced throughout the world.

50. De Beers and its subsidiaries have further limited the world's supply of diamonds and enhanced their price throughout the world by shutting down all mines owned and controlled by De Beers and its subsidiaries. Since 1939 sales of diamonds by defendants have been far in excess of the world's production of diamonds. The excess has been met out of large stocks accumulated by defendants as hereinbefore described and held by them in 1939. Since that date they have greatly increased their sales especially of industrial diamonds and have systematically decreased their production of diamonds of all types.

51. The monopoly power acquired as aforesaid and exercised by the defendants through Diamond Trading Company has been asserted in arbitrary and unfair treatment of prospective purchasers and customers and by enhancement of diamond prices in the United States to arbitrary and exorbitant levels. These effects have been brought about through additional means of regulating the marketing of diamonds and strict control over sales by Diamond Trading Company to dealers as hereinafter described.

52. Diamond Trading Company sells gem diamonds only on four occasions during each year, only in London, and only at so-called "sights", to which only a few selected dealers are admitted. Furthermore gem diamonds at such sights are sold only in series or lots selected by Diamond Trading Com-

pany. Each series or lot contains a wide range of different sizes and qualities, representing more or less a cross-section of the gem diamonds that the company has in stock, arbitrarily chosen by Diamond Trading Company. Dealers can buy at the sights only these selections. The dealers selected for admission to sights are permitted to attend them only on condition that they purchase a minimum of £20,000 of diamonds at each sight which they attend. Diamond Trading Company disciplines dealers who fail to make the required purchases. They are refused admission to subsequent sights and thus are denied opportunity further to engage in purchase of gem diamonds. All purchases are required to be paid for in advance.

53. Diamond Trading Company sells industrial diamonds in various ways. It sells in industrial series at sights in London. It sells Boart and some kinds of industrial diamonds by classes apart from the series. It sometimes sells direct to purchasers in the United States and other countries on order by direct mail or cable or through brokers.

54. As in the sale of gem diamonds, purchasers of industrial diamonds are required by Diamond Trading Company to pay in advance, before delivery, at the time the goods are ordered. Purchasers who have ordered by mail or cable are not permitted to inspect shipments before accepting delivery, or to refuse to accept shipments or to return them after inspection. Diamond Trading Company requires purchasers to buy unseen, and without warranty or representation, the industrial diamonds or boart shipped, and, having been paid, Diamond Trading Company will not take back the goods or make any adjustment. Diamond Trading Company has included in shipments of material sold as industrial diamonds material which cannot be used for the desired industrial purposes or for any purposes at all. Purchasers have no recourse and have no other source from which to buy. Purchasers are frequently prevented from buying the type of

industrial diamonds needed for their or their customers' industrial operations and are permitted to buy only in series elected arbitrarily by Diamond Trading Company.

55. In maintaining the above-described system of complete control of diamond production and marketing, Diamond Trading Company has systematically prevented the accumulation in this country of a stockpile of industrial diamonds. Diamond Trading Company has persistently refused to sell industrial diamonds for stockpiling purposes to agencies of the United States seeking to establish such stockpiles for military reasons. In sales of industrial diamonds to manufacturers and dealers in the United States, Diamond Trading Company has systematically prevented purchases by such companies in amounts that would establish for them more than a few months' supply on hand. When it was feared that German arms might invade England and overrun Africa, the Board of Economic Warfare sought to purchase large quantities of industrial diamonds from the defendants to prevent capture of their existing stocks and to create a stockpile here. The Board succeeded only in obtaining an agreement to establish a stockpile in Canada in the possession of defendants, by the terms of which agreement this stockpile in Canada could be drawn upon for sale and use in the United States only as stocks in this country fell below 90% of what they were on June 30, 1942, and then only when such stocks should not be restored to that level by defendant corporations after 60 days' notice.

56. Diamond Trading Company has increased prices of industrial diamonds during the war by gradually depreciating the quality of industrial series and of most grades and classes of industrial diamonds without reducing prices.

57. The restraints upon production and marketing of diamonds as herein set forth are maintained by defendants for the primary purpose of maintaining diamond prices sold

in, or for export to or import into, the United States, where the purchase and use of diamonds is larger than in any other country in the world. That purpose is furthered by numerous acts done or procured to be done in this country by defendants, including those hereinbelow described, and defendants have put the aforesaid conspiracy into operation, made it effective, and carried it out within the United States in the following ways:

(a) De Beers and its subsidiaries have conducted and now carry on an advertising, publicity, and public relations campaign in the United States through its agents, N. W. Ayer & Son, Inc. One object of this campaign is to induce the consuming public in the United States to believe that diamonds are naturally rare and valuable, and that they are inherently worth the retail prices quoted in the advertisements, prices which are several times those which would prevail under competitive conditions. Another object of the campaign and another function of N. W. Ayer & Son, Inc., is to discourage, eliminate and counteract publicity unfavorable to or critical of De Beers and its subsidiaries. At the direction of De Beers, N. W. Ayer & Son, Inc. has induced publishers of magazines not to run articles which in its view would create publicity unfavorable to De Beers and its subsidiaries.

(b) N. W. Ayer & Son, Inc. under the direction of De Beers, regularly and continuously performs many services in the United States for De Beers and its subsidiaries. It investigates retail prices by using shoppers. It has reported on United States Government price regulations for diamonds. It reports complaints made by customers of the Diamond Trading Company. It has reported on the numbers, wages, hours, and union membership of diamond cutters in New York and Philadelphia. Its agents travel over the United States in the interest of the public relations and publicity campaign.

(c) De Beers and its subsidiaries regularly and continuously have sent and now send representatives to the United States to investigate and report on market conditions, to arrange for and supervise advertising, publicity, and public relations work, and to investigate complaints, most of which have been made because of defendants' monopolistic practices and the resulting high prices, depreciated quality, limited supply, or exclusion of dealers or other purchasers from the trade.

(d) Diamond Trading Company requests and obtains reports on the credit of American customers from its agents in New York, Banque Diamantaire Anversvoise S. A. It also ships packages of diamonds to this bank for delivery to particular customers in the United States.

(e) De Beers and its subsidiaries have had and now have diamonds in the United States. Some of these, while they were in the United States, were sold to the United States Government by a representative of De Beers and its subsidiaries who was in the United States.

(f) As alleged in paragraph 2 and in paragraphs 12 through 20 above, directors and stockholders of two of the corporate defendants and a managing director, an assistant manager, and agents of some of them reside in this country and are here active in the conduct of the affairs of their respective corporations in effectuation of the aforesaid combination and conspiracy.

(g) Forminiere and Diamang regularly and continuously have purchased and are purchasing machinery, tools, and supplies in the United States for use in their mining operations in Africa. Forminiere is continuously represented by an agent in this country for that purpose.

(h) De Beers and its subsidiaries and Forminiere and Diamang regularly and continuously have maintained and now maintain bank accounts in banks in New

York which they use in paying for advertising, publicity, public relations work, and purchases of machinery, tools, and supplies.

(i) Diamond Trading Company, De Beers, its subsidiaries, and other defendants regularly and continuously have used and now use the United States mails for the successful maintenance of their marketing control and the resulting high price level for diamonds to correspond with purchasers in the United States, to ship diamonds to customers in the United States, and to correspond with their advertising, publicity, and public relations agency in the United States, and to carry out the other activities described in this garapraph 57.

(j) De Beers and its subsidiaries have suggested, tampered with, fixed, and maintained, and are suggesting, tampering with, fixing, and maintaining, the United States retail prices of gem diamonds by advertising in the United States the maximum and minimum retail prices for gem diamonds of different weights, thus causing the public to suspect the quality or genuineness of diamonds offered for sale at retail below these prices.

V.

Effects of the Violations of Law

58. Defendants have restrained the trade and commerce of the United States by the aforesaid combination and conspiracy and the contracts, agreements, arrangements, and practices hereinabove described. The said conspiracy has had the following effects, among others, within the United States:

(a) Through the aforesaid quota arrangements and exclusive sales arrangements the production of diamonds for sale to the United States is restricted and limited.

(b) Through Diamond Trading Company, Diamond Corporation, and the Producers Association monopolistic and exorbitant prices are maintained on all diamonds sold to the United States market. For example, sand boart, which Diamond Corporation buys from Forminiere for two shillings a carat, is resold by Diamond Trading Company to dealers in the United States at seven shillings six pence, which is three and a half times the price paid. The passage of industrial diamonds through the hands of Diamond Corporation and Diamond Trading Company costs the United States Government and manufacturers of war goods in the United States many millions of dollars annually. Of De Beers outstanding stock, 38% is cumulative preferred stock with a cumulative preferred annual dividend of 40%, which has been regularly paid. De Beers' net profits were 44% in 1939, 60% in 1940 and 144% in 1943.

(c) Through exclusive sales arrangements all purchasers for import into or export to the United States and dealers and consumers in the United States are prevented from purchasing diamonds from the producers thereof and are compelled to purchase only diamonds sold by Diamond Trading Company under the terms and conditions of sale established and maintained by defendants through Diamond Trading Company.

(d) Agencies of the United States Government have been prevented from obtaining industrial diamonds and boart and establishing a stockpile in the United States, which they desired for military reasons.

(e) Dealers in industrial diamonds and boart in the United States have been and are being dealt with oppressively by Diamond Trading Company by its practice of requiring them to pay for and take industrial diamonds and boart ordered by mail and cable which they have not had an opportunity of examining or inspecting, and as to

which they have no recourse although the material is in many cases worthless or selected by Diamond Trading Company arbitrarily in series unfitted to the purchaser's needs. They have also been oppressed by Diamond Trading Company's practice of reducing the quality of the several grades and classes of industrial diamonds and boart sold.

(f) Individuals and firms in the United States other than certain favored brokers, dealers, and cutters have been and are prevented from purchasing diamonds from the Diamond Trading Company.

VI.

PRAYER

WHEREFORE the plaintiff prays:

(1) That the Court adjudge and decree that the defendants have combined and conspired to restrain and monopolize, and have agreed and contracted to restrain, foreign trade and commerce of the United States in violation of Sections 1 and 2 of the Sherman Antitrust Act, and that defendants, some of whom were engaged in importing, have been engaged in a combination and conspiracy and have been parties to agreements and contracts intended to operate in restraint of lawful trade and free competition in lawful trade and commerce of the United States and intended to increase the market price in the United States of gem diamonds, industrial diamonds, and boart imported into the United States, all in violation of Section 73 of the Wilson Tariff Act.

(2) That defendants and each of them and their successors, officers, directors, agents, representatives, and all persons and corporations acting on their behalf be perpetually enjoined from combining, conspiring, agreeing, or contracting to restrain or monopolize trade and commerce of the

United States with foreign nations in gem diamonds, industrial diamonds, and boart, and that they be perpetually enjoined from engaging in or participating in practices, contracts, relationships or understandings having the purpose or effect of continuing, reviving, or renewing any of the aforesaid violations of the Sherman Antitrust Act and the Wilson Tariff Act.

(3) That defendants, their subsidiaries, successors, stockholders, officers, directors, agents, representatives, and all persons and corporations acting on their behalf be perpetually enjoined from carrying out any existing contracts, agreements, understandings, or arrangements insofar as any as any such contracts, agreements, understandings, or arrangements shall prohibit or prevent sales by them, or any of them, for import into, or for resale for import into, the United States.

(4) That each defendant be enjoined from practicing in concert with any other defendant any policy or from entering into any agreement with any other defendant having the purpose or effect of limiting or restricting import of diamonds into the United States or of enhancing, fixing, stabilizing, or influencing the prices at which diamonds are sold in the United States.

(5) That, in order to prevent the withdrawal, transfer or dissipation of assets in the United States until such time as this Court shall have determined the issues in this case and defendant corporations shall have complied with its orders, the corporate defendants be restrained and enjoined from withdrawing money from banks in the United States and from withdrawing diamonds or other property from safe deposit boxes in the United States and from withdrawing from the United States or selling, transferring, or otherwise disposing of property in the United States.

(6) That the plaintiff have such other, further, and different relief as the nature of the case may require and the court may deem just and proper.

(7) That pursuant to Section 5 of the Sherman Act, an order be made and entered herein requiring such of the defendants as are not within this district to be brought before the court in this proceeding as parties defendant and directing the marshall of the district in which they severally reside to serve summons upon them.

/s/ FRANCIS BIDDLE
FRANCIS BIDDLE
Attorney General

/s/ WENDELL BERGE
WENDELL BERGE
Assistant Attorney General

/s/ JOHN F. X. MCGOHEY
JOHN F. X. MCGOHEY
United States Attorney Southern District of New York

/s/ LAWRENCE S. APSEY
LAWRENCE S. APSEY
Special Assistant to the Attorney General

/s/ HERBERT A. BERMAN
HERBERT A. BERMAN

/s/ PATRICK A. GIBSON
PATRICK A. GIBSON

/s/ EDWARD S. STIMSON
/s/ EDWARD S. STIMSON
Special Assistants to the Attorney General

DEPARTMENT OF JUSTICE, ANTITRUST DIVISION

30 Broad Street, New York 4, New York

STATE OF NEW YORK }
COUNTY OF NEW YORK }

Edward S. Stimson, being first duly sworn, deposes and swears, upon information and belief based upon a long and thorough investigation, that the facts alleged in the foregoing complaint are true.

/s/ EDWARD S. STIMSON
EDWARD S. STIMSON

Sworn to and subscribed before me this 27th day of January, 1945.

/s/ ALMA M. ABBOTT
Notary Public
Notary Public

[NOTARY SEAL]

King's Co. Clk's No. 355, Reg. 200-A-5
N. Y. Co. Clk's No. 419, Reg. 207-A-5
Commission Expires March 30, 1945

My commission expires

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,

v.

DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD., DIAMOND TRADING COMPANY, LTD., SOCIETE GENERALE DE BELGIQUE, SOCIETE MINIERE DU BECEKA, SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO, COMPANHIA DE DIAMANTES DE ANGOLA, CONSOLIDATED AFRICAN SELECTION TRUST, LTD., SIERRA LEONE SELECTION TRUST, LTD., RUSSELL JOHNSON PARKER, LUTE J. PARKINSON, HERBERT H. VREELAND, ALBERT E. THIELE, SOLOMON R. GUGGENHEIM, CLENDENIN J. RYAN, AND GEORGE K. STURM,
Defendants.

Civil No. 29-446

MOTION FOR PRELIMINARY INJUNCTION

The United States of America, plaintiff, moves the Court for a preliminary injunction restraining the above named foreign corporate defendants, namely Societe Internationale Forestiere et Miniere du Congo, Companhia de Diamantes de Angola, Societe Miniere du Beceka, Societe General de Belgique, De Beers Consolidated Mines, Ltd., Diamond Trading Company, Ltd., Diamond Corporation, Ltd., Consolidated African Selection Trust, Ltd., and Sierra Leone Selection Trust, Ltd., from withdrawing money from banks in the United States and from withdrawing diamonds or other property from safe deposit boxes in the United States and from withdrawing from the United States or selling, transferring or otherwise disposing of property in the United States until such time as this Court shall have determined

the issues of this case and defendant corporations shall have complied with its orders.

The injury to the United States of America from the withdrawal of said deposits, diamonds or other property would be irreparable because sequestration of said property is the only means of enforcing this Court's orders or decree against said foreign corporate defendants. The principal business of said defendants is carried on in foreign countries and they could quickly withdraw their assets from the United States and so prevent enforcement of any order or decree which this Court may render.

(S) HERBERT A. BERMAN
HERBERT A. BERMAN

(S) PATRICK A. GIBSON
PATRICK A. GIBSON

(S) EDWARD S. STIMSON
EDWARD S. STIMSON

Special Assistants to the Attorney General
Attorneys for the Plaintiff

U. S. District Court
Filed
Jan. 29, 1945
S. D. of N. Y.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *Plaintiff,* v. DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD., DIAMOND TRADING COMPANY, LTD., SOCIETE GENERALE DE BELGIQUE, SOCIETE MINIERE DU BECEKA, SOCIÉTÉ INTERNATIONALE FORESTIERE ET MINIERE DU CONGO, COMPANHIA DE DIAMANTES DE ANGOLA, CONSOLIDATED AFRICAN SELECTION TRUST, LTD., SIERRA LEONE SELECTION TRUST, LTD., RUSSELL JOHNSON PARKER, LUTE J. PARKINSON, HERBERT H. VREELAND, ALBERT E. THIELE, SOLOMON R. GUGGENHEIM, CLENDENIN J. RYAN, AND GEORGE K. STURM, *Defendants.*	Civil No. 29-446

APPLICATION FOR TEMPORARY RESTRAINING ORDER

The United States of America, plaintiff, upon the facts shown by the verified complaint and by the affidavits of Edward S. Stimson filed herewith, moves the Court for a temporary restraining order without notice restraining the above named foreign corporate defendants, Societe Internationale Forestiere et Miniere du Congo, Companhia de Diamantes de Angola, Societe Miniere du Beceka, Societe Generale de Belgique, De Beers Consolidated Mines, Ltd., Diamond Trading Company, Ltd., Diamond Corporation, Ltd., Consolidated African Selection Trust, Ltd. and Sierra Leone Selection Trust, Ltd., from withdrawing money from banks in the United States and from withdrawing diamonds or other property from safe deposit boxes in the United

States and from withdrawing from the United States or selling transferring or otherwise disposing of property in the United States pending the issuance of a preliminary injunction for the same purpose with the object of preventing the withdrawal, transfer or dissipation of assets in the United States until such time as this Court shall have determined the isues in this case and defendant corporations shall have complied with its orders.

Plaintiff moves the court for the aforesaid temporary restraining order without notice because without it the aforesaid corporate defendants could withdraw deposits from banks in the United States and diamonds from safe deposit boxes in the United States, and dispose of other property in the United States before a hearing could be had and a temporary injunction issue, and should these withdrawals occur this court would be powerless to enforce any order or decree against these foreign corporate defendants and the United States of America would suffer irreparable injury.

(S) Herbert A. Berman
HERBERT A. BERMAN

(S) Patrick A. Gibson
PATRICK A. GIBSON

(S) Edward S. Stimson
EDWARD S. STIMSON

Special Assistants to the Attorney General, Attorneys for the Plaintiff

U. S. District Court
Filed
Jan. 29, 1945
S. D. of N. Y.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,

v.

DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD., DIAMOND TRADING COMPANY, LTD., SOCIETE GENERALE DE BELGIQUE, SOCIETE MINIERE DU BECEKA, SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO, COMPANHIA DE DIAMANTES DE ANGOLA, CONSOLIDATED AFRICAN SELECTION TRUST, LTD., SIERRA LEONE SELECTION TRUST, LTD., RUSSELL JOHNSON PARKER, LUTE J. PARKINSON, HERBERT H. VREELAND, ALBERT F. THIELE, SOLOMON R. GUGGENHEIM, CLENDENIN J. RYAN, AND GEORGE K. STURM,
Defendants.

Civil No. 29-446

AFFIDAVIT

STATE OF NEW YORK
COUNTY OF NEW YORK

EDWARD S. STIMSON, being first duly sworn, says that he is a Special Assistant to the Attorney General with headquarters in the Department of Justice Building in Washington, D. C., that he has made the investigation and prepared the complaint in the above entitled cause and there is a great danger that the Court will be unable to enforce its orders, that its jurisdiction will be defeated and that irreparable injury will result to the United States of America unless a temporary restraining order without notice issues, enjoining the foreign corporate defendants, Societe Internationale Forestiere et Miniere du Congo, Companhia de Diamantes de

Angola, Societe Miniere du Bececka, Societe Generale de Belgique, De Beers Consolidated Mines, Ltd., Diamond Trading Company, Ltd., Diamond Corporation, Ltd., Consolidated African Selection Trust, Ltd., and Sierra Leone Selection Trust, Ltd., from withdrawing money from banks in the United States and from withdrawing diamonds or other property from safe deposit boxes in the United States and from withdrawing from the United States or selling, transferring or otherwise disposing of property in the United States.

If said property is withdrawn or transferred as aforesaid the injury will be irreparable because sequestration of said property is the only means which this Court has of enforcing any order or decree which it may render against said foreign corporate defendants. The principal businesses and activities of said defendants are carried on in foreign countries and they could quickly withdraw their assets from the United States and so prevent enforcement of any order or decree which the Court may render. In this way the jurisdiction which this Court has obtained over these defendants would be fruitless because the means of enforcing the final decree would have been removed.

The temporary restraining order should be granted without notice because notice would give defendant foreign corporations an opportunity to remove bank deposits, diamonds and other property from the United States leaving the Court with a possible right to punish for contempt but with no means of carrying out such a disciplinary measure or of enforcing a decree or order against said foreign defendants.

No previous application for similar relief has been made.

(s) Edward S. Stimson
EDWARD S. STIMSON

[NOTARY SEAL]

Sworn to and subscribed before me this 27 day of January, 1945.

(s) ALMA H. ABBOTT
Notary Public
NOTARY PUBLIC
Kings Co. Clk's No. 355, Reg. 200-A-5
N. Y. Co. Clk's No. 419, Reg. 270-A-5
Commission Expires March 30, 1945

U. S. District Court
Filed
Jan. 29, 1945
S. D. of N. Y.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *Plaintiff,* v. DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD., DIAMOND TRADING COMPANY, LTD., SOCIETE GENERALE DE BELGIQUE, SOCIETE MINIERE DU BECEKA, SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO, COMPANHIA DE DIAMANTES DE ANGOLA, CONSOLIDATED AFRICAN SELECTION TRUST, LTD., SIERRA LEONE SELECTION TRUST, LTD., RUSSELL JOHNSON PARKER, LUTE J. PARKINSON, HERBERT H. VREELAND, ALBERT E. THIELE, SOLOMON R. GUGGENHEIM, CLENDENIN J. RYAN, AND GEORGE K. STURM, *Defendants.*	Civil No. 29-446

AFFIDAVIT

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

EDWARD S. STIMSON, being first duly sworn, says that the investigation which he has made shows the foreign corporate defendants named herein have endeavored to avoid subjecting themselves to the jurisdiction of the courts of the United States by making their sales abroad only and requiring customers to pay in advance for all purchases.

(s) EDWARD S. STIMSON
EDWARD S. STIMSON

Sworn to and subscribed before me
this 29th day of January, 1945.

(s) JEAN WALICKI
Notary Public

JEAN WALICKI
Notary Public, Queens County No. 3357
Cert. Filed in New York Co., No. 769
Commission Expires March 30, 1946

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *Plaintiff*, v. DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD., DIAMOND TRADING COMPANY, LTD., SOCIETE GENERALE DE BELGIQUE, SOCIETE MINIERE DU BECEKA, SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO, COMPANHIA DE DIAMANTES DE ANGOLA, CONSOLIDATED AFRICAN SELECTION TRUST, LTD., SIERRA LEONE SELECTION TRUST, LTD., RUSSELL JOHNSON PARKER, LUTE J. PARKINSON, HERBERT H. VREELAND, AEBERT E. THIELE, SOLOMON R. GUGGENHEIM, CLENDENIN J. RYAN, AND GEORGE K. STURM, *Defendants*.	Civil No. 29-446

TEMPORARY RESTRAINING ORDER

This 29th day of January, 1945, there came on for hearing the application of the United States of America for a temporary restraining order without notice, and it clearly appearing from specific facts shown by the verified complaint herein and by the affidavits of Edward S. Stimson that immediate and irreparable injury may result to the United States of America before notice can be served and a hearing had upon said motion, in that the corporate defendants could quickly withdraw their assets from the United States and thus prevent enforcement of any order or decree which this Court may render because, although they do business in the United States, their principal properties are in foreign countries and their principal business is carried on there; and it further appearing that this order should be granted without

notice because notice would give the foreign corporate defendants an opportunity to remove bank deposits, diamonds and other property from the United States, leaving the Court with a right to punish for contempt but with no means of carrying out such a disciplinary measure or of enforcing a decree or order against said foreign corporate defendants, it is now

ORDERED that said foreign corporate defendants, namely, Societe Internationale Forestiere et Miniere du Congo, Compania de Diamantes de Angola, Societe Miniere du Beceka, Societe Generale de Belgique, De Beers Consolidated Mines, Ltd., Diamond Trading Company, Ltd., Diamond Corporation, Ltd., Consolidated African Selection Trust, Ltd., and Sierra Leone Selection Trust, Ltd., each and all of them, their officers, agents, servants, employees and attorneys, and all persons having notice of this order, be restrained from withdrawing money from banks in the United States and from withdrawing diamonds or other property from safe deposit boxes in the United States and from withdrawing from the United States or selling, transferring or otherwise disposing of property in the United States, and that all persons having notice of this order be enjoined from assisting said corporate defendants, their officers, agents, servants, employees, and attorneys to violate this order; and it is further

ORDERED that this restraining order shall expire upon the decision of plaintiff's motion for a preliminary injunction or ten days from the date and hour of its issuance as hereinafter endorsed hereon, whichever is sooner, unless extended or dissolved by further order; and it is further

ORDERED that plaintiff's motion for a preliminary injunction be set down for hearing on the 2nd day of February, 1945, at 10:30 o'clock A. M., in Room 506 of this Court House, and it is further

ORDERED that service upon the corporate defendants on or before 6:00 o'clock P. M. of the 30th day of January, 1945, of notice that plaintiff's motion for a preliminary injunction will be heard at the aforesaid time shall be deemed a timely notice; and it is further

ORDERED that this order be filed forthwith in the office of the Clerk of this Court and entered of record.

Issued at New York, New York, on this 29th day of January, 1945, at 11:18 o'clock A. M.

(s) VINCENT L. LEIBELL
United States District Judge

U. S. District Court
Filed Jan. 29, 1945
11:35 A. M.
S. D. of N. Y.

U. S. v. *De Beers, et al*

RETURN ON SERVICE

I hereby certify and return that I served a copy of the Summons, Complaint, Affidavits, Application for Temporary Restraining Order, Temporary Restraining Order and Motion for Preliminary Injunction on the following defendants, to wit:—

DE BEERS CONSOLIDATED MINES LTD. *By Serving*:

Jan. 30 Sydney H. Ball at 26 Beaver Street, New York, N. Y. as general agent and cashier.

" 30 Rogers, Mayer & Ball by Lucius Mayer, partner at 26 Beaver Street, New York, N. Y. as general agent and cashier.

" 30 N. W. Ayer & Son, Inc. by Howard G. Rosen, Vice President, at 30 Rockefeller Plaza, New York, N. Y., as general agent and cashier.

" 30 Banque Diamantaire Anversoise S. A. by Michael Romanenko, at 630 Fifth Avenue, New York, N. Y., as general agent and cashier.

DIAMOND CORPORATION, LTD.

Jan. 30 Sydney H. Ball at 26 Beaver Street, New York, N. Y., as general agent and cashier.

" 30 Rogers, Mayer & Ball by Lucius Mayer, partner at 26 Beaver Street, New York, N. Y., as general agent and cashier.

" 30 N. W. Ayer & Son, Inc. by Howard G. Rosen, Vice President, at 30 Rockefeller Plaza, New York, N. Y., as general agent and cashier.

" 30 Banque Diamantaire Anversoise S. A. by Michael Romanenko, at 30 Rockefeller Plaza, New York, N. Y., as general agent and cashier.

DIAMOND TRADING CORPORATION, LTD.

Jan. 30 Sydney H. Ball at 26 Beaver Street, New York, N. Y., as general agent and cashier.

" 30 Rogers, Mayer & Ball by Lucius Mayer, partner at 26 Beaver Street, New York, N. Y., as general agent and cashier.

" 30 N. W. Ayer & Son, Inc. by Howard G. Rosen, Vice President, at 30 Rockefeller Plaza, New York, N. Y., as general agent and cashier.

" 30 Banque Diamantaire Anversoise S. A. by Michael Romanenko, at 630 Fifth Avenue, New York, N. Y., as general agent and cashier.

(signed)

JAMES E. MULCAHY
U. S. Marshal, SDNY.

U. S. District Court
Filed
Feb. 5, 1945
S. D. of N. Y.

DISTRICT COURT OF THE UNITED STATES

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *Plaintiff*, v. DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD., DIAMOND TRADING COMPANY, LTD., SOCIETE GENERALE DE BELGIQUE, SOCIETE MINIERE DU BECEKA, SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO, COMPANHIA DE DIAMANTES DE ANGOLA, CONSOLIDATED AFRICAN SELECTION TRUST, LTD., SIERRA LEONE SELECTION TRUST, LTD., RUSSELL JOHNSON PARKER, LUTE J. PARKINSON, HERBERT H. VREELAND, ALBERT E. THIELE, SOLOMON R. GUGGENHEIM, CLENDENIN J. RYAN, AND GEORGE K. STURM, *Defendants*.	Civil No. 29-446

MODIFICATION OF TEMPORARY RESTRAINING ORDER

This 31st day of January 1945 the United States of America by its attorney Edward S. Stimson, applied for a modification of the temporary restraining order heretofore granted in this cause on the 29th day of January 1945, the modification being for the purpose of making it clear that the order does not apply to the funds of persons having notice of the order but only to the funds of the corporate defendants. It is therefore

ORDERED that the temporary restraining order heretofore granted in this cause on January 29, 1945 be and the same is hereby modified by adding the words "belonging to de-

fendants" after the word "money" in line 9, and after the word "property" in lines 10 and 12, all of the first full paragraph on page 2 of said temporary restraining order.

Issued at New York, New York, on this 31st day of January 1945, at 10:15 o'clock A. M.

VINCENT L. LEIBELL
United States District Judge

U. S. District Court
Filed
Jan. 31, 1945
S. D. of N. Y.

DISTRICT COURT OF THE UNITED STATES

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *Plaintiff*, v. DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD., DIAMOND TRADING COMPANY, LTD., SOCIETE GENERALE DE BELGIQUE, SOCIETE MINIERE DU BECEKA, SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO, COMPANHIA DE DIAMANTES DE ANGOLA, CONSOLIDATED AFRICAN SELECTION TRUST, LTD., SIERRA LEONE SELECTION TRUST, LTD., RUSSELL JOHNSON PARKER, LUTE J. PARKINSON, HERBERT H. VREELAND, ALBERT E. THIELE, SOLOMON R. GUGGENHEIM, CLENDENIN J. RYAN, AND GEORGE K. STURM, *Defendants*.	Civil No. 29-146

MODIFICATION OF TEMPORARY RESTRAINING ORDER

This 31st day of January, 1945 the United States of America by its attorney, Edward S. Stimson, applied for a modification of the temporary restraining order heretofore granted in this cause on the 29th day of January, 1945, the modification being for the purpose of releasing property on board the ship S. S. Talisman of the Barber Lines, Inc. and on the dock for loading therein belonging to or for shipment to Societe Internationale Forestiere Et Miniere du Congo (Forminiere) or Societe Miniere du Beceka (Beceka) and to be used in the mining of diamonds and tin in the Belgian Congo. It is estimated that the value of this property is $14,650 and that $5,000 of the purchase price is yet unpaid

and that an additional $2,000 will be required to cover handling, freight and other charges. It is therefore

ORDERED that the temporary restraining order heretofore granted in this cause on January 29, 1945 be and the same is modified to permit the removal from the United States of the aforesaid property of Forminiere or Beceka in the S. S. Talisman and on the docks for loading therein and to permit the forwarding to Forminiere or Beceka of the shipping papers relating thereto and that Forminiere or S. H. Ball be permitted to withdraw $7,000 from the account at the Chase National Bank in the name of S. H. Ball, Consulting Geologist, Forminiere for the purpose of completing payment for the aforesaid property and the handling, freight and other charges thereon.

Issued at New York, N. Y.
on this 31st day of January, 1945
at 10:15 o'clock, A. M.

s/ VINCENT L. LEIBELL
United States District Judge

U. S. District Court
Filed
Jan. 31, 1945
S. D. of N. Y.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,

v.

DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD., DIAMOND TRADING COMPANY, LTD., SOCIETE GENERALE DE BELGIQUE, SOCIETE MINIERE DU BECEKA, SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO, COMPANHIA DE DIAMANTES DE ANGOLA, CONSOLIDATED AFRICAN SELECTION TRUST, LTD., SIERRA LEONE SELECTION TRUST, LTD., RUSSELL JOHNSON PARKER, LUTE J. PARKINSON, HERBERT H. VREELAND, ALBERT E. THIELE, SOLOMON R. GUGGENHEIM, CLENDENIN J. RYAN, AND GEORGE K. STURM;
Defendants.

Civil No. 29-446

ORDER EXTENDING AND AMENDING TEMPORARY RESTRAINING ORDER

On the second day of February, 1945, at 10:30 o'clock A.M., the motion of the United States of America for a preliminary injunction came on for hearing and Robert T. Swaine, John Wood and James B. Alley made statements as officers of the court as set out in the attached affidavit of Edward S. Stimson and it appearing that there is good cause for postponing the hearing of the motion of the United States for preliminary injunction in that time is needed to communicate with the officers of the foreign corporate defendants, said officers being abroad, and time will be needed by any attorneys whom they may authorize to act for them to prepare for argument on the motion; it is therefore

ORDERED that the temporary restraining order heretofore granted on January 29, 1945 as modified by the two orders signed and filed on January 31, 1945 be amended to read as stated in subsequent paragraphs and as amended be extended to 12 o'clock midnight, February 16, 1945, or to the entry of the order on plaintiff's motion for a preliminary injunction, whichever is sooner, and that the amended and extended order read as follows:

ORDERED that said foreign corporate defendants, namely, Societe Internationale Forestiere et Miniere du Congo, Companhia de Diamantes de Angola, Societe Miniere du Beceka, Societe Generale de Belgique, De Beers Consolidated Mines, Ltd., Diamond Trading Company, Ltd., Diamond Corporation, Ltd., Consolidated African Selection Trust, Ltd., and Sierra Leone Selection Trust Ltd., each and all of them, their officers, agents, servants, employees and attorneys, and all persons having notice of this order be restrained from withdrawing money belonging to the corporate defendants from banks in the United States and from withdrawing diamonds or other property belonging to the corporate defendants from safe deposit boxes in the United States and from withdrawing from the United States or selling, transferring or otherwise disposing of property belonging to the corporate defendants in the United States, and that all persons having notice of this order be enjoined from assisting said corporate defendants, their officers, agents, servants, employees and attorneys to violate this order; and it is further

ORDERED that this temporary restraining order shall not apply to monies or funds which, after January 29, 1945, are paid or transmitted abroad through banks in the United States for account of or credit to any of the corporate defendants by or on behalf of persons other than the corporate defendants, where such payments or transfers are made for diamonds to be delivered from outside the United States to or for the account of such persons; nor shall this order apply

to diamonds so purchased after January 29, 1945; and this temporary restraining order shall not apply to funds sent by the foreign corporate defendants from outside of the United States after January 29, 1945 for the purpose of paying for mining machinery equipment and supplies purchased for shipment abroad, and for expenses incident thereto, nor to the aforesaid mining machinery equipment and supplies purchased with said funds. Any bank through which any payment or transfer is made after January 29, 1945 for credit to or account of any of the corporate defendants by or on behalf of persons other than the corporate defendants and any bank which receives any payment or transfer of funds made on behalf of the corporate defendants from outside the United States after January 29, 1945 for payment or transfer to any person other than the defendants, may assume in the absence of knowledge to the contrary, that this order does not apply to such payment or transfer; and it is further

ORDERED that this restraining order shall be and remain subject to the provisions of the two modifying orders signed and filed on January 31, 1945; and it is further

ORDERED that this restraining order shall expire at 12 Midnight on February 16, 1945 or on the entry of the order on plaintiff's motion for a preliminary injunction, whichever is sooner, unless extended or dissolved by further order of the court; and it is further

ORDERED that plaintiff's motion for a preliminary injunction be set down for hearing on the 13th day of February 1945 at 10:30 o'clock A.M.; and it is further

ORDERED that this order be filed forthwith in the office of the Clerk of this Court and entered on record.

Issued at New York, New York, on this 6th day of February 1945 at 10:20 o'clock A.M.

/s/ VINCENT L. LEIBELL
United States District Judge

U. S. District Court
Filed
Feb. 6, 1945
S. D. of N. Y.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *Plaintiff*, v. DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD., DIAMOND TRADING COMPANY, LTD., SOCIETE GENERALE DE BELGIQUE, SOCIETE MINIERE DU BECEKA, SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO, COMPANHIA DE DIAMANTES DE ANGOLA, CONSOLIDATED AFRICAN SELECTION TRUST, LTD., SIERRA LEONE SELECTION TRUST, LTD., RUSSELL JOHNSON PARKER, LUTE J. PARKINSON, HERBERT H. VREELAND, ALBERT E. THIELE, SOLOMON R. GUGGENHEIM, CLENDENIN J. RYAN, AND GEORGE K. STURM, *Defendants*.	Civil No. 29-446

AFFIDAVIT

EDWARD S. STIMSON, being first duly sworn deposes and says that he is a Special Assistant to the Attorney General with headquarters in Washington, D. C. and that at 10:30 o'clock on February 2, 1945 he was present in Judge Vincent L. Leibell's courtroom, Room 506, United States Court House, Foley Square, New York, when the motion of the United States for a preliminary injunction in the above-entitled cause which was noted for hearing at that time was called, and that he heard what took place there, which was as follows:

That Herbert A. Berman, Special Assistant to the Attorney General, Washington, D. C., Attorney for the United States of America in the above-entitled cause answered that

the United States was ready to argue for the motion; that Robert T. Swaine of Cravath, Swaine & Moore said that he wished to make a statement as an officer of the court, that he was not authorized to appear for any of the defendants, that he had a cable from South Africa, that he could not say on the basis of this cable that he was authorized to represent De Beers Consolidated Mines, Ltd., Diamond Corporation, Ltd. and Diamond Trading Company, Ltd. that he would probably get instructions and that he needed time to communicate further with South Africa, and that if he were authorized to represent the three corporations he needed time to become acquainted with the case and prepare for argument; that John Wood of Root, Clark, Buckner & Ballantine stated, as an officer of the court that he was not appearing on behalf of any party but that he had been consulted by certain of the individual defendants on whom process had been served as alleged representatives of foreign corporations, that he believed such individual defendants had no authority to retain counsel to represent any of the foreign corporations or to authorize any action on their behalf and that time was needed to communicate to such foreign corporate defendants the facts as to the institution of this action; that James B. Alley, as an officer of the court, stated that he had been consulted by and was representing an individual and a corporation which had been served as alleged agents of Societe Generale de Belgique, that he thought Societe Generale de Belgique was not doing business in this country, that time was needed to communicate with Societe Generale de Belgique in order to ascertain the facts and to prepare for argument.

That Judge Vincent L. Liebell said that it appeared that there was not sufficient time for the foreign corporate defendants to employ counsel and for their counsel to prepare for argument of the motion, that good cause had been shown for postponing the argument on the plaintiff's motion for a preliminary injunction and asked counsel to prepare an order postponing the hearing on the motion for a preliminary in-

junction to February 13 and extending the temporary restraining order to February 16.

S/ EDWARD S. STIMSON

Sworn and subscribed to before me
this 5th day of February 1945.

S/ Leo Cohen
LEO COHEN
Notary Public, Kings Co. Clk's No. 52
N. Y. Co. Clk's No. 62, Bronx Co. Clk's No. 5
Commission Expires March 30, 1946

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,

v.

DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD., DIAMOND TRADING COMPANY, LTD., SOCIETE GENERALE DE BELGIQUE, SOCIETE MINIERE DU BECEKA, SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO, COMPANHIA DE DIAMANTES DE ANGOLA, CONSOLIDATED AFRICAN SELECTION TRUST, LTD., SIERRA LEONE SELECTION TRUST, LTD., RUSSELL JOHNSON PARKER, LUTE J. PARKINSON, HERBERT H. VREELAND, ALBERT E. THIELE, SOLOMON R. GUGGENHEIM, CLENDENIN J. RYAN, AND GEORGE K. STURM,
Defendants.

Civil No. 29-446

ORDER CONTINUING AMENDED TEMPORARY RESTRAINING ORDER

On the 13th day of February 1945, at 10:30 o'clock A. M. the motion of the United States of America for a preliminary injunction came on for hearing and on the application of Edward S. Stimson that the hearing on said motion be postponed until February 23, 1945, at 10:30 A. M. and that the temporary restraining order heretofore granted in this cause be extended to February 26, 1945 at 12 midnight, as set out in the attached affidavit of Edward S. Stimson, and it appearing from said affidavit that there is good cause for postponing the hearing of the motion of the United States for a preliminary injunction in that time is needed to communicate with and receive instructions from the officers of the foreign corporate defendants who are abroad; it is therefore

ORDERED that the amended temporary restraining order issued on February 6, 1945 be extended to 12 o'clock midnight February 26, 1945 or to the entry of the order on plaintiff's motion for a preliminary injunction, whichever is sooner, unless extended or dissolved by further order of this Court; and it is further

ORDERED that plaintiff's motion for a preliminary injunction be set down for hearing on the 23rd day of February 1945, at 10:30 o'clock A. M.; and it is further

ORDERED that this order be filed forthwith in the office of the Clerk of this Court and entered of record.

Issued at New York, New York, on this 14th day of February, 1945 at 3:15 o'clock P. M.

EDWARD A. CONGER
United States District Judge

U. S. District Court
Filed
Feb. 14, 1945
S. D. of N. Y.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *Plaintiff*, v. DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD., DIAMOND TRADING COMPANY, LTD., SOCIETE GENERALE DE BELGIQUE, SOCIETE MINIERE DU BECEKA, SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO, COMPANHIA DE DIAMANTES DE ANGOLA, CONSOLIDATED AFRICAN SELECTION TRUST, LTD., SIERRA LEONE SELECTION TRUST, LTD., RUSSELL JOHNSON PARKER, LUTE J. PARKINSON, HERBERT H. VREELAND, ALBERT E. THIELE, SOLOMON R. GUGGENHEIM, CLENDENIN J. RYAN, AND GEORGE K. STURM, *Defendants*.	Civil No. 29-446

AFFIDAVIT

EDWARD S. STIMSON, being first duly sworn, says he is a a Special Assistant to the Attorney General with headquarters in the Department of Justice Building in Washington, D. C.; That he has conferred with counsel for all of the foreign corporations, that they asked for a postponement of the time for arguing the motion for a preliminary injunction because they needed more time to communicate with and receive instructions from the officers of the foreign corporate defendants who are abroad, that he stated to said counsel that the Government was willing to postpone the time for argument of the preliminary injunction ten days provided the temporary restraining order also be extended for the same length of time; that counsel for defendant corporations stated that they had no objection to such an ex-

tension of the temporary restraining order; that he was present in Room 506 of the Federal Court House when the plaintiff's motion for a preliminary injunction came on for hearing before Judge Conger and that he stated that the hearing of the plaintiff's motion was postponed until February 23, 1945, at 10:30 A. M. and that the temporary restraining order heretofore granted in this cause be extended to February 26, 1945, at 12 midnight and that he understood the defendants had no objection; and that counsel for the defendant corporation were present but did not speak.

EDWARD S. STIMSON
EDWARD S. STIMSON

Sworn and subscribed to before
me this 14th day of February, 1945.
LEO COHEN

[NOTARIAL STAMP]

IN THE DISTRICT COURT OF THE UNITED STATES

For the Southern District of New York

United States of America, *Plaintiff,* v. De Beers Consolidated Mines, Ltd., Diamond Corporation, Ltd., Diamond Trading Company, Ltd., Societe Generale de Belgique, Societe Miniere du Beceka, Societe Internationale Forestiere et Miniere du Congo, Companhia de Diamantes de Angola, Consolidated African Selection Trust, Ltd., Sierra Leone Selection Trust, Ltd., Russell Johnson Parker, Lute J. Parkinson, Herbert H. Vreeland, Albert E. Thiele, Solomon R. Guggenheim, Clendenin J. Ryan, and George K. Sturm, *Defendants.*	Civil No. 29-446

ORDER EXTENDING TIME TO MOVE, ANSWER OR PLEAD

From the affidavit of Edward S. Stimson executed on the 16th day of February 1945, it appears that there is good cause for extending the time which the defendants have in which to move, answer or plead, in that time is needed to communicate with the officers of the foreign corporate defendants who are abroad and to receive instructions from them; it is therefore

Ordered that the time of the defendants within which to move, answer, or plead, or to move or serve notice of motion with respect to the summons, jurisdiction, complaint and the return of process upon defendants herein be, and the same hereby is, extended to and including the 19th day of March, 1945; and it is further

ORDERED that this order be filed forthwith in the office of the Clerk of this court and entered of record.

Issued at New York, New York on this 16th day of February, 1945 at o'clock P. M.

EDWARD A. CONGER
United States District Judge

U. S. District Court
Filed
Feb. 17, 1945
S. D. of N. Y.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,

v.

DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD., DIAMOND TRADING COMPANY, LTD., SOCIETE GENERALE DE BELGIQUE, SOCIETE MINIERE DU BECEKA, SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO, COMPANHIA DE DIAMANTES DE ANGOLA, CONSOLIDATED AFRICAN SELECTION TRUST, LTD., SIERRA LEONE SELECTION TRUST, LTD., RUSSELL JOHNSON PARKER, LUTE J. PARKINSON, HERBERT H. VREELAND, ALBERT E. THIELE, SOLOMON R. GUGGENHEIM, CLENDENIN J. RYAN, AND GEORGE K. STURM,
Defendants.

Civil No. 29-446

MOTION

The defendants, De Beers Consolidated Mines, Ltd., Diamond Corporation, Ltd., and Diamond Trading Company, Ltd., move the above-named Court that the Marshal's Return on Service, and the purported service of process herein upon them, be quashed, and the complaint dismissed as against them, and each of them, upon the ground that this Court has not, and did not acquire, jurisdiction over the persons of said defendants, or any of them, for the reasons that (1) none of said defendants is an inhabitant of or is found or is doing business within the State of New York, and (2) none of the persons upon whom the purported service of process was made on behalf of said defendants was a person authorized

to accept or receive process on behalf of said defendants, or any of them.

February 23, 1945.

CRAVATH, SWAINE & MOORE,

By WM. DWIGHT WHITNEY

A member of the firm

Attorneys for said defendants,

15 Broad Street,

New York, N. Y.

U. S. District Court
Filed
Feb. 23, 1945
S. D. of N. Y.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *Plaintiff,* v. DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD., DIAMOND TRADING COMPANY, LTD., SOCIETE GENERALE DE BELGIQUE, SOCIETE MINIERE DU BECEKA, SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO, COMPANHIA DE DIAMANTES DE ANGOLA, CONSOLIDATED AFRICAN SELECTION TRUST, LTD., SIERRA LEONE SELECTION TRUST, LTD., RUSSELL JOHNSON PARKER, LUTE J. PARKINSON, HERBERT H. VREELAND, ALBERT E. THIELE, SOLOMON R. GUGGENHEIM, CLENDENIN J. RYAN, AND GEORGE K. STURM, *Defendants.*	Civil No. 29-446

ORDER EXTENDING AMENDED TEMPORARY RESTRAINING ORDER

On the 23rd day of February, 1945, at 10:30 o'clock A. M., the motion of the United States of America for a preliminary injunction came on for hearing and counsel for some of the defendant corporations appearing specially and without waiving defenses as to jurisdiction, stated that they needed additional time to prepare for argument of the motion and asked for an adjournment and counsel for the United States of America consented thereto, and it appearing that there is good cause for postponing the hearing of the motion of the United States for a preliminary injunction in that counsel for some of the defendant corporations need additional time to prepare for argument, it is

ORDERED that the amended temporary restraining order issued on February 6, 1945 and extended to February 26, 1945, by an order entered on the 14th day of February, 1945 be extended to 12 o'clock midnight, March 8, 1945 or to the entry of the order on plaintiff's motion for a preliminary injunction, whichever is sooner, unless extended or dissolved by further order of this court; and it is further

ORDERED that plaintiff's motion for a preliminary injunction be set down for hearing on the 2nd day of March, 1945 at 1:30 P.M., and it is further

ORDERED that this order be filed forthwith in the Office of the Clerk of this Court and entered on record.

Issued at New York, New York, on this 26th day of February 1945 at 10:30 o'clock A.M.

s/ SAMUEL MANDELBAUM,
United States District Judge

U. S. District Court
Filed
Feb. 28. 1945
S. D. of N. Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *Plaintiff*, v. DE BEERS CONSOLIDATED MINES, LTD., et al., *Defendants*.	Civil No. 29-446

AFFIDAVIT

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

ROBERT T. SWAINE, being duly sworn, deposes and says:

1. I am a member of the firm of Cravath, Swaine & Moore, attorneys for the defendants De Beers Consolidated Mines, Ltd., Diamond Corporation, Ltd., and Diamond Trading Company, Ltd.

2. I was informed by representatives of the Standard Bank of South Africa, Ltd. of No. 67 Wall Street, New York City, that on the same day on which the restraining order herein was served upon said bank, it received a cabled remittance from De Beers Consolidated Mines, Ltd. in the sum of $59,320, and that said sum is being held by said bank subject to said restraining order issued by the United States District Court, Southern District of New York, on January 29, 1945, and the amendments and modifications thereof.

(signed) ROBERT T. SWAINE

Sworn to before me this
2d day of March, 1945.

WILLIAM V. KEENAN
Notary Public, Nassau County
Nassau Co. Clk's No. 2138
N. Y. Co. Clk's No. 864 Reg. No. 481-K-6
Bronx Co. Clk's No. 39 Reg. No. 210-K-6
Certificate also filed in Richmond Co.
Commission Expires March 30, 1946

[NOTARIAL SEAL]

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *Plaintiff*,

v.

DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD., DIAMOND TRADING COMPANY, LTD., SOCIETE GENERALE DE BELGIQUE, SOCIETE MINIERE DU BECEKA, SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO, COMPANHIA DE DIAMANTES DE ANGOLA, CONSOLIDATED AFRICAN SELECTION TRUST, LTD., SIERRA LEONE SELECTION TRUST, LTD., RUSSELL JOHNSON PARKER, LUTE J. PARKINSON, HERBERT H. VREELAND, ALBERT E. THIELE, SOLOMON R. GUGGENHEIM, CLENDENIN J. RYAN, AND GEORGE K. STURGIS, *Defendants*.

Civil No. 29-446

ORDER AMENDING AND EXTENDING TEMPORARY RESTRAINING ORDER

On the 2nd day of March 1945 at 1:30 o'clock P. M. the motion of the United States of America for a preliminary injunction came on for hearing and was argued by counsel for the Government and counsel for some of the corporate defendants, appearing specially and without waiving jurisdiction, and the Court reserved decision on the motion for a preliminary injunction and ordered that the temporary restraining order be extended; counsel for De Beers Consolidated Mines Ltd. asked that the temporary restraining order be modified to permit the continuance of the advertising and publicity campaign and public relations work being carried on in the United States for De Beers Consolidated Mines, Ltd., and counsel for the United States consented thereto

and on March 6, 1945 counsel for Societe Forestiere et Miniere du Congo advised counsel for United States that the exception in the previous order did not permit banks to receive funds from abroad after January 29, 1945 from a corporate defendant for deposit to the credit of corporate defendant and thus Societe Forestiere et Miniere du Congo could not deposit funds in its account at the Chase National Bank for use in paying for purchases of machinery equipment and supplies and counsel for the United States consented to change the order to permit such deposits and payments; it is therefore

ORDERED THAT the amended temporary restraining order issued on February 6, 1945 and extended by subsequent orders be amended to read as stated in subsequent paragraphs and as amended be and the same is hereby extended to 12 o'clock midnight, March 18, 1945 or to the entry of the order on plaintiff's motion for a preliminary injunction, whichever is sooner, and that the amended and extended order read as follows:

ORDERED that said foreign corporate defendants, namely, Societe Internationale Forestiere et Miniere du Congo, Companhia de Diamantes de Angola, Societe Miniere du Beceka, Societe Generale de Belgique, De Beers Consolidated Mines, Ltd., Diamond Trading Company, Ltd., Diamond Corporation, Ltd., Consolidated African Selection Trust, Ltd. and Sierra Leone Selection Trust Ltd., each and all of them, their officers, agents, servants, employees and attorneys, and all persons having notice of this order be restrained from withdrawing money belonging to the corporate defendants from banks in the United States and from withdrawing diamonds or other property belonging to the corporate defendants from safe deposit boxes in the United States and from withdrawing from the United States or selling, transferring or otherwise disposing of property belonging to the corporate defendants in the United States, and that all persons having

notice of this order be enjoined from assisting said corporate defendants, their officers, agents, servants, employees and attorneys to violate this order; and it is further

ORDERED that this temporary restraining order shall not apply to monies or funds which, after January 29, 1945, are paid or transmitted abroad through banks in the United States for account of or credit to any of the corporate defendants by or on behalf of persons other than the corporate defendants, where such payments or transfers are made for diamonds to be delivered from outside the United States to or for the account of such persons; nor shall this order apply to diamonds so purchased after January 29, 1945; and this temporary restraining order shall not apply to funds sent by the foreign corporate defendants from outside of the United States after January 29, 1945 nor to mining machinery equipment and supplies purchased for shipment abroad, or expenses incident thereto, paid for out of any of said funds sent from outside the United States after January 29, 1945. Any bank through which any payment or transfer is made after January 29, 1945 for credit to or account of any of the corporate defendants by or on behalf of persons other than the corporate defendants and any bank which receives any payment or transfer of funds made on behalf of the corporate defendants from outside the United States after January 29, 1945 may assume, in the absence of knowledge to the contrary, that this order does not apply to such payment or transfer or any further payment or transfer of such funds, and it is further

ORDERED that this restraining order shall be and remain subject to the provisions of the two modifying orders signed and filed on January 31, 1945; and it is further

ORDERED that this restraining order shall expire at 12 Midnight on March 18, 1945 or on the entry of the order on

plaintiff's motion for a preliminary injunction, whichever is sooner.

Issued at New York, New York, on this 7 day of March, 1945 at 10:15 o'clock A. M.

SAMUEL MANDELBAUM
United States District Judge

U. S. District Court
Filed
Mar. 7, 1945
S. D. of N. Y.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,

v.

DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD., DIAMOND TRADING COMPANY, LTD., SOCIETE GENERALE DE BELGIQUE, SOCIETE MINIERE DU BECEKA, SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO, COMPANHIA DE DIAMANTES DE ANGOLA, CONSOLIDATED AFRICAN SELECTION TRUST, LTD., SIERRA LEONE SELECTION TRUST, LTD., RUSSELL JOHNSON PARKER, LUTE J. PARKINSON, HERBERT H. VREELAND, ALBERT E. THIELE, SOLOMON R. GUGGENHEIM, CLENDENIN J. RYAN, AND GEORGE K. STURM,
Defendants.

Civil No. 29-446

AFFIDAVIT

EDWARD S. STIMSON, being first duly sworn deposes and says that he is a Special Assistant to the Attorney General with headquarters in the Department of Justice Building in Washington, D. C., that with the assistance of others he has made an investigation of the extent and nature of business done in the United States by the foreign corporate defendants and that by this investigation he ascertained the following facts:

Societe Internationale Forestiere et Miniere du Congo (Forminiere)

Defendant, Forminiere, is a corporation organized under the laws of the Belgian Congo. While the Belgian Government owns stock interest in this company, the stock which

it owns has no voting power and the Belgian government does not direct its management. At the time of filing of the complaint, aproximately 50% of the voting stock of this company was owned by the defendants, Albert E. Thiele and Herbert H. Vreeland (the latter now deceased), as trustees under the Congo Mines Participation Agreement. Its principal business consists of mining diamonds and marketing them through the Diamond Trading Company, Ltd., pursuant to the unlawful arrangement alleged in the complaint.

Forminiere is the largest producer of industrial diamonds in the world, producing approximately two-thirds of the world's supply. It has in excess of 16,000 employees. All of its property except as hereinafter stated is located outside the United States; all of its officers with the exceptions hereinafter noted also reside outside of the United States. For many years prior to the date of the filing of the complaint herein and up to the present time, the business which the defendant Forminiere has conducted in the Southern District of New York has included the following:

Since about 1910 two directors of said corporation have continuously resided in the Southern District of New York and have continuously performed their duties as Directors of Forminiere.

Since 1910 to date, Sidney H. Ball has been continuously employed by Forminiere as purchasing agent and consulting geologist. Said Sidney H. Ball maintains offices at 26 Beaver Street, New York, New York, and at said offices has continuously performed most of his duties as consulting geologist of Forminiere. Some of the duties performed by Ball are hereinafter described.

Forminiere pays part of the office expenses for the offices maintained by said Ball at 26 Beaver Street. The said Ball, from his offices at 26 Beaver Street, carries on an extensive correspondence on behalf of Forminiere. The stationery which he uses has at the top of its letterhead, in large type, SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO and below that, SIDNEY H. BALL, CONSULTING GEOLOGIST. A

copy of said stationery is attached hereto and made part hereof.

For many years prior to the date of the filing of this complaint Forminiere has continuously maintained bank accounts in the Southern District of New York. Since 1910, Forminiere has continuously maintained an account at the Chase National Bank. This account is in the name of "Sidney H. Ball, Consulting Geologist, Forminiere."

Until 1941 the said Ball was authorized by Forminiere to draw on said account by check signed by him. Since 1941, Ball and one of the two American directors of Forminiere were authorized to sign checks on said account.

During the year 1944 the balance maintained by Forminiere in the Chase account ranged from half a million dollars to one million dollars. The account has been a very active one, for example, during the first six months of 1944, approximately 295 checks were drawn on this account. Forminiere also maintained a bank account at the Guaranty Trust Company in the name of "Societe Internationale Forestiere et Miniere du Conga" from May 1939 to January 4, 1944. The balance varied from $7,000 to $44,000. Originally Whelpley and Vreeland were authorized to draw on the account jointly. Later Ball and Sturm were empowered to draw upon it, using checks countersigned by Vreeland or Whelpley.

Forminiere purchases in this country a large portion of the supplies required to house, feed and shelter its more than 16,000 employees, and substantially all of the equipment, machinery and supplies required for the operation of its mines and mills, the greater part of said supplies and equipment being purchased for Forminiere by the said Sidney H. Ball. Ball receives requests for equipment and supplies from Forminiere, selects the supplier and the supplies and equipment required by Forminiere, makes the purchases and pays for them by drawing checks on the bank account in the Chase National Bank described above.

The current purchases of Forminiere in this country aggregate about a million dollars a year. The scope of Balls' agency in the United States is indicated by the circumstance that most of the substantial contracts of purchase reflected in this figure were consummated here by Ball, and the further circumstance that Ball to procure the release of $16,000 frozen by the temporary restraining order in the instant proceedings, represented that he would cause the directors of Forminiere to replace the funds so released, and that following such representation replenishment of the fund was in fact accomplished.

The purchasing activities conducted by Ball in the Southern District on behalf of Forminiere are frequent and continuous. The type of equipment and supplies purchased and the separate purchases are too voluminous to set forth herein. Some of the typical purchases include the following: aluminum and its alloys; chemicals; copper wire; pipes; sheets; diesel engines; a steam shovel; electrical machinery; equipment and supplies; fuel oil; hardware; household equipment; hospital supplies; hydraulic pumps; iron bars and rods; car wheels and axles; castings; lathes; motors; paints, oils and varnishes; plates, rails, railroad truck equipment; typewriters; wire fencing; rubber manufactures; wheelbarrows.

Sidney H. Ball as purchasing agent and consulting geologist for Forminiere carries on from his offices at 26 Beaver Street in the Southern District of New York correspondence with the manufacturers and suppliers in order to conclude the voluminous purchases in part enumerated above. The equipment purchased is consigned by manufacturers and suppliers to Ball and inspected and accepted by him in the Southern District of New York. Ball also arranges for the packaging and transportation of the material and supplies to Forminiere in Africa.

In order to export the supplies and equipment purchased by Forminiere, as above described, Forminiere must obtain export licenses from the United States. Moreover, a large

part of such supplies and equipment comprise critical items, and in order to obtain such material and supplies, Forminiere must obtain priorities from the War Production Board. Ball, as consulting geologist of Forminiere, carries on extensive negotiations and holds numerous conferences with officials of the United States Government in order to obtain priorities and export licenses. In order to obtain such permits one must satisfy the government officials in charge of the matter as to Forminiere's need for the equipment and supplies and as to its importance to the war effort. Ball, as consulting geologist, prepares applications for licenses and priorities in the Southern District; such applications are signed "Societe Internationale Forestiere et Miniere du Congo, by Sidney H. Ball, Consulting Geologist". The supplies and equipment purchased by Forminiere in the Southern District are essential for the continued operation of Forminiere's mines and mills and without such equipment and without such priorities Forminiere would not be able to conduct its business. Since the outbreak of the European war in 1939, the United States has been the principal source of supply for the material above described.

COMPANHIA DE DIAMANTES DE ANGOLA (DIAMANG)

Defendant, Diamang, is a corporation organized under the laws of Portugal. Its principal business consists of mining diamonds and marketing them through the Diamond Trading Company pursuant to the unlawful arrangement alleged in the complaint in this case. Diamang produces several hundred thousand carats of diamonds annually. All of its property, except as hereinafter stated, is situated outside of the United States; all of its officers with the exception subsequently noted, also reside outside the United States. Continuously and for many years prior to the date of the filing of the complaint in this case and up to the present time, Diamang has transacted business in the United States in the

Southern District of New York and the business which the defendant Diamang has so conducted has included the following;

Since before 1915 two directors of said corporation have continuously resided in the Southern District of New York and have continuously performed their duties as directors of Diamang.

Since 1915 and to the date of the filing of the complaint in this case, George K. Sturm has been continuously employed by Diamang as purchasing agent and auditor. Said George K. Sturm maintains offices at 26 Beaver Street, New York, New York and at said offices has continuously performed most of his duties as purchasing agent and auditor of Diamang. Some of the duties performed by Sturm are hereinafter described.

Diamang pays part of the office expenses for the offices maintained by said Sturm at 26 Beaver Street. Sturm, from his office at 26 Beaver Street carries an extensive correspondence on behalf of Diamang. His signature appears on letters at the top of which appear the words COMPANHIA DE DIAMANTES DE ANGOLA and below that, 26 BEAVER STREET. A copy of one of said letters is attached hereto and made a part hereof.

For many years prior to the date of the filing of the complaint in this case Diamang has continuously maintained bank accounts in the Southern District of New York. For many years and to the date of the filing of the complaint in this case, Diamang has continuously maintained an account at the Guaranty Trust Company, New York City. This account is in the name of "Companhia de Diamantes de Angola". The balance maintained in this account is in the neighborhood of $100,000. The account could be drawn upon by the joint signatures of any two of the following three persons, Sturm and the two American directors of Diamang. The account has been an active one.

Diamang purchases in this country a large portion of the supplies required to house, feed and shelter its employees;

and substantially all of the equipment, machinery and supplies required for the operation of its mines and mills, the greater part of said supplies and equipment being purchased for Diamang by the said George K. Sturm, its purchasing agent and auditor. Sturm receives requests for equipment and supplies from Diamang, selects the supplier and the supplies and equipment required by Diamang, makes the purchases and pays for them by drawing checks on the bank account in the Guaranty Trust Company described above.

The supplies and equipment purchased by Diamang in this country amount to several hundred thousand dollars annually. The purchasing activities conducted by Sturm in the Southern District of New York on behalf of Diamang are frequent and continuous. The type of equipment and supplies purchased and the separate purchases are too voluminous to set forth herein. Some typical purchases are as follows: Wire rope, pumps, motors, wrenches, valve refacing machine, grinding wheels, gauges, inserted tooth saws, surveying compasses, steel shovel blades, belt fasteners, and rubber hose.

George K. Sturm, as purchasing agent and auditor for Diamang, carries on from his office at 26 Beaver Street in the Southern District of New York, correspondence with the manufacturers and suppliers in order to conclude voluminous purchases described above. The equipment purchases are consigned by manufacturers and suppliers to Sturm and inspected and accepted by him in the Southern District of New York. Sturm arranges for the packaging and transportation of the material and supplies to Diamang in Africa. Diamang, in order to export the supplies and equipment purchased by Diamang as above described, must first obtain export licenses from the United States. A large part of such supplies and equipment are critical items and in order to obtain them, Diamang must secure a priority from the War Production Board. Sturm, as purchasing agent and auditor of Diamang, carries on extensive negotiations and holds conferences with officials of the United States Government in

order to obtain priorities and export licenses. In order to obtain such permits, it is necessary for Sturm to satisfy Government officials as to Diamang's needs for equipment and supplies and of its importance to the war effort. Sturm, as purchasing agent and auditor, prepares applications for licenses and priorities in the Southern District of New York; such applications are signed George K. Sturm, but the application is made on behalf of "Companhia de Diamantes de Angola". Equipment and supplies purchased by Diamang in the Southern District of New York are necessary for the continued operation of Diamang's mines and mills. Without such equipment and priorities Diamang would not be able to conduct its business.

DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD., DIAMOND TRADING COMPANY, LTD.

Defendant De Beers owns 80% of the capital stock of defendant, The Diamond Corporation, Ltd.; the remaining 20% being owned by the Consolidated Diamond Mines of Southwest Africa, which De Beers controls. Defendants De Beers and Diamond Corporation each own 50% of the stock of the Diamond Trading Company. De Beers controls and manages the activities of the Diamond Corporation and the Diamond Trading Company.

All the officers and employees of De Beers Consolidated Mines, Ltd., Diamond Corporation, Ltd., and Diamond Trading Company, Ltd. reside outside of the United States and, to the knowledge of deponent, all the property belonging to the three corporations, with the exceptions hereinafter set forth, is located in countries outside of the United States.

The Diamond Trading Company controls and markets, pursuant to the unlawful arrangements described in the complaint, 95% of the world's supply of industrial and gem diamonds. The United States is by far the largest market in the world for gem diamonds and approximately 90% of all

industrial diamonds sold by the Diamond Trading Company are purchased by brokers and dealers located in the United States.

At the time of the filing of the complaint herein and for many years prior thereto, the three companies, De Beers Consolidated Mines, Ltd., Diamond Corporation, Ltd. and Diamond Trading Company, Ltd, transacted business in the United States and more particularly in the Southern District of New York. The activities of the three companies in the United States include:

For many years prior to the filing of the complaint, the three companies have followed the practice of regularly sending their officers and employees to the United States to transact the business of the three companies.

Among the officers and employees who come to the United States to transact business for the three corporations are, Sir Ernest Oppenheimer, Chairman of the Boards of De Beers Consolidated Mines, Ltd., Diamond Corporation, Ltd. and Diamond Trading Company, Harold Thomas Dickinson, Technical Director of De Beers Consolidated Mines, Ltd., Fergus Rogers, Lute J. Parkinson, Assistant General Manager of De Beers Consolidated Mines, Ltd., and Stanley Routley. Such officers and employees have stayed in the United States for various periods of time for the purpose of transacting business for the three companies. The stay of some of these officers or employees extended over periods of months. Harold T. Dickinson spent most of the years 1941 and 1942 in the United States. Parkinson came to the United States in August, 1943 and his stay in this country lasted until February, 1944. While in this country such officers and employees have maintained offices in the Southern District of New York in space furnished either by the N. W. Ayer & Co., 30 Rockefeller Plaza, New York, N. Y. or by the Newmont Mining Co. of 14 Wall Street, New York, N. Y. While such officers and employees were in the Southern District, in addition to directing the advertising and publicity campaign which the three companies carry on in the United

States, reported to their home office on the market condition in respect to diamonds in the United States; investigated complaints made by customers of the Diamond Trading Company in the United States; conferred with brokers and dealers of diamonds in order to promote the business and good will of the three companies; carried on negotiations with officials of the United States Government in respect of selling large amounts of diamonds; participated in wage negotiations carried on by the diamond cutters of the Diamond Makers Protective Union; displayed and sold certain quantities of diamonds to the trade in this country; and carried on other activities in behalf of the three corporations.

De Beers has for many years maintained bank accounts in the Southern District of New York including accounts with the Standard Bank of South Africa, Ltd. of 67 Wall Street, New York, N. Y., Barclay's Bank, 120 Broadway, New York, N. Y., and Chase National Bank, 18 Pine Street, New York, N. Y., in its own name and in the names of employees.

The three companies presently carry on and have for many years carried on an extensive public relations and advertising campaign in the United States designed to increase their sales of diamonds in this country.

De Beers Consolidated Mines, Ltd., Diamond Corporation, Ltd. and Diamond Trading Co. maintained in the New York Worlds Fair in the years 1939 to 1941 an extensive display of diamonds having a value of approximately eight million dollars. After the Worlds Fair closed these diamonds were kept for some time in safe deposit boxes maintained by De Beers at the Chase Safe Deposit Co. and Rockefeller Center Bonded Warehouse. Some of these diamonds were released from bond, customs duty paid by De Beers and sold within the Southern District of New York.

De Beers also contributes sums of money to associations such as the Gemological Institute of America, the American Gem Society, Jewelry Industry Publicity Board, to assist in the activities of these associations which foster the sale of diamonds by promotional and publicity work. De Beers

financed the publication in the United States of certain books such as "The Story of Diamonds" issued by the Chicago Jewelers' Association and "Famous Diamonds of the World." Both of these books are sold in the United States by the Gemological Institute of America.

De Beers employs the N. W. Ayer & Co., 30 Rockefeller Plaza, New York, N. Y., to assist in its advertising and public relations work in this country.

The three companies regularly advertise in leading publications in the United States. This advertising is designed to increase the sale of diamonds by the three companies in this country. As a result of the advertising, their sales have materially increased. Some of the advertisements set forth retail prices of diamonds for the purposes alleged in the complaint, tampering with, fixing and maintaining retail prices of gem diamonds in the United States. In addition to the advertising, N. W. Ayer engages in extensive publicity and public-relations campaign in the United States on behalf of De Beers Consolidated Mines, Ltd., the Diamond Trading Company and the Diamond Corporation, Ltd. One of the purposes of the campaign is to discourage, eliminate and counteract publicity unfavorable to our critical of De Beers and its subsidiaries. Another purpose of the publicity campaign is to increase the sales of diamonds in this country and to promote good-will.

In addition to the advertising and public relations work referred to above N. W. Ayer & Son, Inc. performed many services in the United States as agents for De Beers Consolidated Mines, Ltd., Diamond Corporation and Diamond Trading Company, Ltd. It investigates retail prices of diamonds by using shoppers, reports on Government price regulations for diamonds, reports complaints made by customers of the Diamond Trading Co., investigates the number, wages, hours and union membership of diamond cutters in New York and Philadelphia; supplies office facilities for officers and employees of De Beers while they are in the United States, and receives and forwards mail for them. De

Beers Consolidated Mines, Ltd., Diamond Corporation Ltd. and Diamond Trading Co. have displayed and sold diamonds in the United States following the Worlds Fair.

The three companies displayed the diamonds which they had in this country at the Worlds Fair at the offices of N. W. Ayer for the purpose of securing customers for such diamonds. Officers of De Beers then in the United States sold some of the aforesaid diamonds at offices which the Diamond Trading Company then maintained at 30 Rockefeller Plaza, New York, N. Y. during May and June, 1941.

Harold Thomas Dickinson referred to above, an officer of defendant De Beers Consolidated Mines, Ltd., while in New York in 1941 and 1942 carried on negotiations with officials of the U. S. Treasury for the purpose of selling them large quantities of industrial diamonds and sold several million dollars worth of industrial diamonds. Some of the diamonds so sold were brought by Dickinson to the United States and there shown to officials of the Treasury, and sold by Dickinson to the Treasury Department. All the diamonds purchased by the United States Government were shipped by The Diamond Trading Company to the United States, inspected and payment made by the United States Government after delivery, inspection and acceptance in this country.

On or about September 1942 the Diamond Trading Company contracted to sell four and a half million carats of diamonds to the Metals Reserves Co., 811 Vermont Avenue, N. W., Washington, D. C. The contract provided for payment to the Diamond Trading Co. after the Diamond Trading Co. had shipped the material to New York and after inspection and acceptance of the material by representatives of the Metals Reserve Co. in the Southern District of New York.

Subsequently, the U. S. Commercial Co., an agency of the United States, entered into two contracts with the Diamond Trading Company, one on August 9, 1944, of 6,000 carats of industrial diamonds and another in 1943 of 10,000 carats of industrial diamonds. Contracts provided that the diamonds would be delivered by the Diamond Trading Com-

pany to the U. S. Commercial Co. at 60 Beaver Street, New York, N. Y. and that payment would be made after arrival of the stones in New York and after inspection and acceptance of the stones by persons designated by U. S. Commercial Co. Approximately eighty per cent of the diamonds delivered under the August 9, 1944 contract were returned to the Diamond Trading Company because they were not satisfactory. Defendants De Beers Consolidated Mines, Ltd.; Societe Generale de Belgique and Societe Internationale Forestiere et Miniere du Congo own and control the Banque Diamantaire Anversoise of 630 Fifth Avenue, New York, N. Y. and defendants De Beers Consolidated Mines, Ltd. utilizes such bank as a Credit Department of the Diamond Trading Co. in the United States. The sole business of the Banque Diamantaire consists of the financing of the purchase of diamonds. Approximately 75% of this business consists of financing brokers and dealers located in the United States who wish to purchase diamonds from the Diamond Trading Company. The Diamond Trading Company ships many of the diamonds so financed and purchased by brokers and dealers in the United States to the aforesaid bank for delivery by it to such customers and brokers in the United States.

The Banque Diamantaire also furnishes credit information concerning prospective American purchasers to the Diamond Trading Company and otherwise assists the Diamond Trading Company's operations in the United States.

s/ EDWARD S. STIMSON
EDWARD S. STIMSON

Sworn to and subscribed before me
this 9th day of March, 1945.
s/ JEAN WALICKI
Notary Public
JEAN WALICKI
Notary Public, Queens County No. 3357
Cert. Filed in New York Co. No. 760
Commission Expires March 30, 1946

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,

v.

DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD., DIAMOND TRADING COMPANY, LTD., SOCIETE GENERALE DE BELGIQUE, SOCIETE MINIERE DU BECEKA, SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO, COMPANHIA DE DIAMANTES DE ANGOLA, CONSOLIDATED AFRICAN SELECTION TRUST, LTD., SIERRA LEONE SELECTION TRUST, LTD., RUSSELL JOHNSON PARKER, LUTE J. PARKINSON, HERBERT H. VREELAND, ALBERT LTD., RUSSEL JOHNSON PARKER, LUTE J. DENIN J. RYAN, AND GEORGE K. STURM,
Defendants.

Civil No. 29-446.

EXEMPTION FROM TEMPORARY RESTRAINING ORDER

On this 16th day of March, 1945, counsel for Companhia de Diamantes de Angola, appearing specially and without waiving objections to jurisdiction, represented to counsel for the Government that the right to hold shipping space reserved on behalf of Companhia de Diamantes de Angola would be lost unless assurances could be given that it would be used, and requested that the machinery, equipment and supplies listed below, which had been paid for, be released from the temporary restraining order so that they can be exported to Companhia de Diamantes de Angola in Africa in said shiping space; and George K. Sturm having promised that he would endeavor to have Companhia de Diamantes de Angola deposit the value of said machinery, equipment and supplies in its bank account at the Guaranty Trust Company to be held subject to said temporary restraining order and that he believed Companhia de Diamantes de Angola

would do so; and counsel for the Government consented thereto. The said machinery, equipment and supplies, with aproximate quantities are as follows:

Paid for by check:		*Amount*
Saw mill parts		$1,116.16
8,100 lbs. of Electrodes (used for welding)		606.05
3 reels and 7 coils of bare copper wire and cable		662.34
500 ft. of 3" water Hose (used for sluicing)		435.00
3,300 ft of flexible electric cord		53.42
5,000 shovel blades		3,850.00
10 pcs ⅜" x 8" steel plates		143.35
26 Barcalo and Stillson wrenches		61.22
20 Hacksaw Frames		
110 boxes of Belt fasteners		161.84
30 pces Belt fasteners		78.82
90 sets of cutting taps		
41 pces bearings		41.87
3 surveying compasses		99.90
		$7,309.97
Paid for under Letters of Credit:		
33 pces of steel sheets	$292.91	
Milling cutters	456.82	749.73
		$8,059.70

it is therefore

ORDERED, that the order issued herein on March 7, 1945, at 10:15 o'clock A. M., as extended by an order issued on the same day as this order, be and the same is modified to permit the removal from the United States of the above mentioned property of Companhia de Diamantes de Angola and to permit the forwarding to Companhia de Diamantes de Angola of all shipping papers relating thereto.

Issued at New York, N. Y., on this 16th day of March, 1945, at 10:30 o'clock A. M.

s/ SAMUEL MANDELBAUM
United States District Judge.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,

v.

DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD., DIAMOND TRADING COMPANY, LTD., SOCIETE GENERALE DE BELGIQUE, SOCIETE MINIERE DU BECEKA, SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO, COMPANHIA DE DIAMANTES DE ANGOLA, CONSOLIDATED AFRICAN SELECTION TRUST, LTD., SIERRA LEONE SELECTION TRUST, LTD., RUSSELL JOHNSON PARKER, LUTE J. PARKINSON, HERBERT H. VREELAND, ALBERT E. THIELE, SOLOMON R. GUGGENHEIM, CLENDENIN J. RYAN, AND GEORGE K. STURM,
Defendants

CIVIL NO.
No. 29-446

ORDER CONTINUING TEMPORARY RESTRAINING ORDER

On the 13th day of March 1945 at 4:00 o'clock P. M. at a conference in Judge Mandelbaum's chambers in the United States Court House, Foley Sq., New York, New York, at which were present Judge Samuel Mandelbaum and counsel for the Government and for each of the corporate defendants, Judge Mandelbaum stated that it would take him some time to decide the Government's motion for a preliminary injunction in the above entitled cause and counsel for the Government then pointed out that the existing temporary restraining order expired on Sunday, March 18, 1945, that it took about three days to renew the temporary restraining order

and to serve the 26 banks and asked that the temporary restraining order be continued for an additional 10 days or until the ruling on the Government's motion for a preliminary injunction whichever was sooner, and Judge Mandelbaum stated that he would renew the temporary restraining order; and it appearing that there is good cause for continuing the temporary restraining order in that the Court needs time to consider and decide the motion for a preliminary injunction; it is therefore

ORDERED that the order issued on March 7th, 1945 amending and extending the temporary restraining order be and the same hereby is extended and continued to 12 o'clock midnight, March 28, 1945 or to the entry of the order on plaintiff's motion for a preliminary injunction, whichever is sooner, unless extended or dissolved by further order of this court; and it is further

ORDERED that this order be filed forthwith in the office of the Clerk of this court and entered of record.

Issued at New York, New York, on this 16th day of March, 1945 at 10:30 o'clock A. M.

s/ SAMUEL MANDELBAUM
United States District Judge

U. S. District Court
Filed
March 16, 1945
S. D. of N. Y.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,

v.

DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD., DIAMOND TRADING COMPANY, LTD., SOCIETE GENERALE DE BELGIQUE, SOCIETE MINIERE DU BECEKA, SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO, COMPANHIA DE DIAMANTES DE ANGOLA, CONSOLIDATED AFRICAN SELECTION TRUST, LTD., SIERRA LEONE SELECTION TRUST, LTD., RUSSELL JOHNSON, PARKER, LUTE J. PARKINSON, HERBERT H. VREELAND, ALBERT E. THIELE, SOLOMON R. GUGGENHEIM, CLENDENIN J. RYAN, AND GEORGE K. STURM,
Defendants.

Civil No. 29-446.

ORDER CONTINUING TEMPORARY RESTRAINING ORDER

At a hearing in this matter before Judge Samuel Mandelbaum on the 21st day of March, 1945, at which were present counsel for the Government and for each of the corporate defendants, Judge Mandelbaum allowed the filing of further affidavits by Tuesday, March 27, 1945, and it appearing that there will not be sufficient time after March 27, 1945 to extend the temporary restraining order which expires March 28, 1945, and it appearing that there is good cause for continuing the temporary restraining order in that there will not be sufficient time after the 27th to extend the same before its expiration on March 28th and in that the Court will need more than one day in which to decide the motion for a preliminary injunction after the aforesaid affidavits are filed; it is therefore

ORDERED that the order issued on March 7, 1945 amending and extending the temporary restraining order, as modified by an order exempting certain property issued March 16, 1945, be, and the same hereby is, extended and continued to 12 o'clock midnight April 7, 1945 or to the entry of the order on plaintiff's motion for a preliminary injunction, whichever is sooner, unless extended or dissolved by further order of this court; and it is further

ORDERED that this order be filed forthwith in the Office of the Clerk of this Court and entered of record.

Issued at New York, N. Y. on this 27th day of March, 1945 at 11:50 o'clock A.M.

s/ SAMUEL MANDELBAUM
United States District Judge

U. S. District Court
Filed
Mar. 27, 1945
S. D. of N. Y.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *Plaintiff,* v. DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD., DIAMOND TRADING COMPANY, LTD., SOCIETE GENERALE DE BELGIQUE, SOCIETE MINIERE DU BECEKA, SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO, COMPANHIA DE DIAMANTES DE ANGOLA, CONSOLIDATED AFRICAN SELECTION TRUST, LTD., SIERRA LEONE SELECTION TRUST, LTD., RUSSELL JOHNSON PARKER, LUTE J. PARKINSON, HERBERT H. VREELAND, ALBERT E. THIELE, SOLOMON R. GUGGENHEIM, CLENDENIN J. RYAN, AND GEORGE K. STURM. *Defendants.*	Civil No. 29-446

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

AFFIDAVIT OF WARNER S. SHELLY

WARNER S. SHELLY, being duly sworn, deposes and says:

I am and have been since November, 1938, a vice-president of N. W. Ayer & Son, Inc. (hereinafter called Ayer), referred to in the complaint in the above-entitled suit. From May, 1939, until November, 1944, I had general charge or supervision of the services rendered by Ayer to De Beers Consolidated Mines, Ltd. (hereinafter called De Beers), one of the defendants in said suit. As a vice-president of Ayer, I am familiar with the business and affairs of Ayer, including all services heretofore and now being rendered by Ayer to De Beers. I am also familiar with the facts hereinafter

stated with respect to the business and affairs of De Beers and the business and affairs of Diamond Corporation, Ltd. and Diamond Trading Company, Ltd., two other defendants in said suit, my familiarity with these facts being the result of correspondence with De Beers, and conversations with officers of the said three defendants and personal observation, principally in South Africa.

Service of the summons and complaint in said suit has been attempted to be made on said three defendants by serving Ayer.

De Beers is in the business of mining and selling diamonds and a diamantine substance known as boart. Diamonds are sold by De Beers in the condition in which they come from the mines. Such diamonds are called rough diamonds, and fall into two classes, (1) those suitable for manufacture into cut gem diamonds (sometimes called polished diamonds) and (2) those suitable for industrial use (commonly called industrial diamonds). These rough diamonds, in the case of gem diamonds, are merely the raw materials out of which are manufactured the ultimate product used by the consuming public, i.e., cut gem diamonds. The mining operations of De Beers are carried on in the Union of South Africa and sales by De Beers are made chiefly, if not wholly, in Africa.

Diamond Corporation, Ltd. and Diamond Trading Company, Ltd. are in the business of buying and selling rough diamonds and boart. Their business is carried on chiefly, if not wholly, in Africa and England.

During the period May, 1939, to date (being the period of activity with which affiant is familiar) none of the officers or directors of any of said three defendants resided in the United States except for temporary residence during visits hereinafter described, and no corporate meetings were held in the United States.

Ayer's business is entirely different in nature from the business of said three defendants. Ayer is in the advertising business. It is one of the oldest and largest advertising firms

in the United States, and has many clients in this country and abroad.

Ayer has never performed any services of any character for, or had any business relations with, the defendant, Diamond Corporation, Ltd., or the defendant, Diamond Trading Company, Ltd., although Ayer has done personal favors for officers of one or both of said corporations while they were in the United States.

As an independent contractor, and not as an agent, Ayer has been engaged by De Beers to plan and carry out an advertising and publicity campaign to stimulate the purchase, by the consuming public from retail dealers, of cut gem diamonds, a product not sold by any of said three defendants. The product thus advertised by Ayer is fabricated from raw diamonds mined or sold by said three defendants and others, but is not fabricated by any of those defendants. Between the mining and sale of rough gem diamonds by said three defendants and the sale to the consuming public of the ultimate product advertised by Ayer, the diamonds pass through many hands, all wholly independent of said three defendants, including brokers and dealers in rough diamonds, fabricators commonly called diamond cutters, and wholesalers and retailers of the finished product. Over these intermediate steps between the sale of the raw material by said three defendants and the purchase of the finished product by the ultimate consumers, none of said three defendants has any control. The prices charged to the ultimate consumer for the finished product are many times the price of the raw material sold by said three defendants. The sale of industrial diamonds is not the object of said advertising and publicity campaign.

Ayer is not a managing agent, or a general agent, or a cashier of any of said three defendants, and neither Ayer nor any of its officers or employees has ever been authorized by any of said three defendants to receive process on its behalf in a suit against it. Ayer has no proprietary interest of any kind, direct or indirect, in any of the said three de-

fendants, and the said three defendants, respectively, have no proprietary interest of any kind, direct or indirect, in Ayer. None of Ayer's officers, directors, or employees is an officer, director, or employee of any of said three defendants.

Ayer has never been authorized to make, and has never made, contracts of any kind for said defendants. Ayer has never been authorized to make, and has never made, purchases of any kind for said defendants. Ayer has never been authorized to adjust or negotiate adjustments of claims of customers of said defendants, and has never done so. Ayer has never been authorized to investigate, and has never investigated complaints of such customers.

Ayer has never been authorized to take or transmit, and has never taken or transmitted, orders for products sold by any of said three defendants. Ayer has never been authorized to send out, and has never sent out, bills or invoices for any of said defendants, and has never been authorized to make, and has never made, collections for any of said defendants. Ayer has never carried for sale or display products sold by any of said three defendants. Ayer has never been authorized to engage, supervise or discharge, and has never engaged, supervised or discharged, any of the employees of said defendants. Ayer has never kept books of accounts or records of sales of said defendants.

Ayer has never been in charge of cash of any of said defendants, and has never been authorized to draw, and has never drawn, on a bank account of any of them.

Neither Ayer nor any of its officers, agents or employees has ever been authorized to do or transact, or has ever done or transacted, any of the business of said defendants.

Origin and Purpose of the Diamond Advertising and Publicity Campaign

In September, 1938, Gerold M. Lauck and Paul L. Lewis, two officers of Ayer, had interviews in New York with Harry F. Oppenheimer, an officer of De Beers, who, affiant is informed, had come to the United States to make arrange-

ments for a diamond exhibit at the New York World's Fair of 1939. This was the earliest contact between Ayer and De Beers. At said interviews, Ayer's representatives were asked whether a national advertising and publicity campaign to stimulate retail sales of cut gem diamonds in the United States could be made sufficiently effective to justify an expenditure by De Beers for such a campaign, and if so, what the plan of the campaign should be. The objective of De Beers in stimulating retail sales of cut gem diamonds in the United States was indirectly to stimulate wholesale sales of rough gem diamonds in Africa and London.

Ayer's representatives stated that De Beers' questions could not be answered without the aid of a survey and study of the American consumer market for diamonds and its potentialities. This advice was confirmed by a letter to Harry F. Oppenheimer dated September 6, 1938, in which Ayer offered to make the necessary survey and study for a fee of not exceeding $10,000. The offer was accepted by De Beers by a letter dated at London December 2, 1938.

Ayer made the survey and study above referred to, and submitted a report to De Beers dated April, 1939. Gerold M. Lauck, an executive vice-president of Ayer, went to London and South Africa to present the report and discuss the recommendations contained therein. The report recommended that De Beers appropriate approximately $500,000 per annum for three years for a diamond advertising and publicity campaign, a general plan for which was outlined in said report. Late in May, 1939, De Beers by cable from South Africa authorized Ayer to proceed with said campaign in accordance with the recommendations in said report. On June 22, 1939, Ayer signed an acceptance of a letter from De Beers which stated the arrangement under which Ayer was to handle said campaign for De Beers. Said letter was signed on behalf of De Beers by H. T. Dickinson in the United States. Dickinson was then in the United States on a holiday and in connection with the diamond exhibit at the New York World's Fair of 1939.

The object of said campaign is clearly indicated in said report. At the outset, the report pointed out that the value of imports into the United States of diamonds, cut and uncut, but not set, in 1926 was 23.8% less than in 1919, and in 1938 was 62.6% less than in 1926; that the number of carats of such imports in 1926 was 2.9% less than in 1919, and in 1938 was 46.7% less than in 1926; and that the decline in volume was evidently accompanied by a shift to smaller or poorer quality stones. The report contrasted these declines in diamond imports with the rises that had taken place in the same period in sales of well-advertised "luxury" products of other kinds. The report said:

> "The evidence developed by our study establishes the fact that there exists a very real and sound foundation on which to build a conservative plan for diamond promotion. We are certain that if the competition of other luxuries is met in kind, if the younger people are educated to an appreciation of diamonds, and if the jeweler is encouraged to put more effort behind his own diamond selling, *the present situation can be fully capitalized upon, and a marked and long-term increase in the value of diamond imports effected.*" [The words here underscored are italicized in the report.]
>
> "The present state of the market is the result, in part, of recent economic conditions, but the long-term downward trend has been caused by a change in social attitudes, in style and fashion trends, and by the vigorous promotion of competitive luxuries. * * *
>
> "The purpose of the studies presented in this report has been not only to establish facts regarding the distribution of diamonds, but to explore the public mind as to its attitude toward diamond ownership.
>
> "For it is the public, particularly those millions in the middle-income group, who must be influenced in their thought, taste, habits and fashions, if the sale of diamonds is to be appreciably increased."
>
> "Coming logically to the conclusion that a definite plan of educational promotion must be undertaken, if the long-term decline in diamond sales is to be arrested and increased business hoped for, the question of plan and procedure naturally follows. * * *

"First of all, we believe that De Beers Consolidated Mines, Ltd., independent of any action by diamond importers or retail merchants, should undertake a long-term campaign of advertising and publicity in the United States. * * *

"But the campaign should be a continuous one, educational in character. * * *

"We feel that your advertising should aim to accomplish these objectives:

"(1) Protect and encourage the tradition of the diamond engagement ring.

"(2) Increase the average value of the diamonds bought for engagements.

"(3) Increase the sale of all types of diamond jewelry in the general luxury market in competition with other promoted types of luxury merchandise."

The object of said campaign was also stated from time to time in announcements addressed to jewelers, which Ayer caused to be published in diamond trade journals. Extracts from some of these announcements follow:

"An unprecedented announcement affecting every jeweler in America: Within the week, DIAMONDS will be Nationally Advertised. * * * It [the diamond advertising campaign] is designed to protect and increase your diamond business and to stimulate public demand for finer stones."

"In 144,000,000 advertisements this coming year, this promotion sells an idea—the *diamond*—to help you sell diamond merchandise. You buy nothing, you contribute nothing."

"All [advertisements] are dedicated to the purpose of making your customers want diamonds—better ones, larger ones than ever before."

"The 46,000,000th advertisement has been released in the long-term national promotion of diamonds in competition with other promoted luxuries. Soundly based on your own answers and the answers of your customers to the National Survey—addressed to the people who are your potential customers—stressing the selection of finer stones—costing you not an extra penny!"

"Who's Behind All This Talk About Diamonds?

"You are! For your diamond sales present and future, determine De Beers diamond sales—therefore they are the whole underlying purpose of the great national campaigns which have set all America talking diamonds."

These announcements addressed to jewelers did not solicit orders for purchases of diamonds from De Beers or from Diamond Corporation, Ltd., or Diamond Trading Company, Ltd.

Work Done by Ayer in Connection With the Diamond Advertising and Publicity Campaign

From the summer of 1939 up to the present time Ayer has been carrying out, in whole or in part, the program outlined in Ayer's report to De Beers dated April, 1939. For a period of one year, September, 1942—August, 1943, the consumer advertising was discontinued, and the trade paper advertising and the publicity were carried on. Annual budgets for the cost of these services to De Beers were submitted by Ayer to De Beers. Gerold M. Lauck and affiant each made two trips to South Africa for the purpose of submitting budgets to De Beers.

The functions of Ayer in carrying out said program have been as follows: (1) writing, designing, and illustrating advertisements, and mechanically preparing them for printing; (2) purchasing advertising space in magazines, newspapers, and trade journals in Ayer's own name and on its own credit; (3) causing advertisements to be published, and checking and verifying insertions of advertisements; (4) disseminating information about diamonds in various ways other than by purchasing advertising space; (5) furnishing to the jewelry trade, at not exceeding cost, materials (such as window and counter displays, booklets, mats for newspaper advertisements, and recordings of radio announcements) and ideas useful to retail jewelers for the purpose of promoting the sale of their own cut gem diamonds; (6) continuously studying cut gem diamonds and their market

in the United States for the purpose of obtaining and developing ideas for advertising "copy" and publicity activities; (7) regularly reporting to De Beers on the progress of the advertising and publicity campaign; and (8) regularly reporting to De Beers on the increase or decrease of sales of cut gem diamonds or diamond jewelry by about 17 retail jewelry stores in various parts of the United States, for the purpose of making some appraisal of the results of the advertising and publicity campaign.

Submitted herewith as Exhibits A-1 and A-2 are bound volumes containing the forms of all advertising which have been published by Ayer as part of the above-mentioned advertising campaign.

Examination of these advertisements will demonstrate the fact pointed out above, that none of the advertisements advertises the articles which said three defendants mine or sell, viz., rough diamonds, but all such advertisements advertise only the ultimate product—cut gem diamonds—fabricated by others, whose operations are separated from the operations of said three defendants by many intermediate steps, heretofore referred to. The advertisements do not solicit the public, diamond retailers, or wholesalers to purchase diamonds from any of said three defendants.

All acts done by Ayer in carrying out the advertising and publicity campaign were appropriate for the purpose of increasing the popularity of cut gem diamonds, making the wearing of diamond jewelry more fashionable, and thus inducing the consuming public to purchase more cut gem diamonds and diamond jewelry from retail jewelers. Said acts were not done by Ayer for any other purpose.

Relationship Between Ayer and De Beers

In planning and carrying out the advertising and publicity campaign hereinbefore referred to, Ayer acted as an independent contractor, not as an agent.

Ayer was engaged by De Beers to accomplish certain results in line with broad policies approved by De Beers, and

at a cost to De Beers not exceeding the annual budgets. De Beers exercised no control or direction over the conduct of the service. Furthermore, the great distance between the United States and South Africa made any control or direction by De Beers from South Africa impossible, and none of the officers or representative of De Beers while in the United States has exercised such control or direction. The detail of all the advertising, its typographical preparation, the development of the material upon which it was based, the determination of the magazines, newspapers and other publications in which it was published, were all determined solely by Ayer. The detail of all news prepared and released in the course of the publicity campaign, and the detail of all promotional material and the manner of its distribution were all determined solely by Ayer. In rendering advertising and publicity service to De Beers, Ayer, in its own name and at the risk of its own capital, bought advertising space from publishers, employed personnel and facilities, placed orders, and made contracts with various persons. Ayer had no power to obligate De Beers contractually, or to make De Beers a party to any transaction. In other words, Ayer annually sells to De Beers an amount of service calculated to cost as nearly as possible a pre-determined amount, and that amount having been determined, Ayer, not De Beers, determines the form and the manner in which the service is to be performed.

Allegations of the Complaint Concerning Ayer

Affiant has read the complaint in the above-entitled suit, and, particularly, paragraph 57 thereof, which alleges in part as follows:

> "(a) De Beers and its subsidiaries have conducted and now carry on an advertising, publicity, and public relations campaign in the United States through its agent, N. W. Ayer & Son, Inc. One object of this campaign is to induce the consuming public in the United States to believe that diamonds are naturally rare and

valuable, and that they are inherently worth the retail prices quoted in the advertisements, prices which are several times those which would prevail under competitive conditions. Another object of the campaign and another function of N. W. Ayer & Son, Inc. is to discourage, eliminate and counteract publicity unfavorable to or critical of De Beers and its subsidiaries. At the direction of De Beers, N. W. Ayer & Son, Inc. has induced publishers of magazines not to run articles which in its view would create publicity unfavorable to De Beers and its subsidiaries.

"(b) N. W. Ayer & Son, Inc. under the direction of De Beers, regularly and continuously performs many services in the United States for De Beers and its subsidiaries. It investigates retail prices by using shoppers. It has reported on United States Government price regulations for diamonds. It reports complaints made by customers of the Diamond Trading Company. It has reported on the numbers, wages, hours, and union membership of diamond cutters in New York and Philadelphia. Its agents travel over the United States in the interest of the public relations and publicity campaigns.

"(c) De Beers and its subsidiaries regularly and continuously have sent and now send representatives to the United States to investigate and report on market conditions, to arrange for and supervise advertising, publicity, and public relations work, and to investigate complaints, most of which have been made because of defendants' monopolistic practices and the resulting high prices, depreciated quality, limited supply, or exclusion of dealers or other purchasers from the trade.

* * * * * *

"(j) De Beers and its subsidiaries have suggested, tampered with, fixed, and maintained, and are suggesting, tampering with, fixing, and maintaining, the United States retail prices of gem diamonds by advertising in the United States the maximum and minimum retail prices for gem diamonds of different weights, thus causing the public to suspect the quality or genuineness of diamonds offered for sale at retail below these prices."

The above-quoted allegations are untrue and misleading in many respects, and affiant therefore sets forth the true facts concerning the matters therein referred to. Except as stated in this affidavit, said allegations are untrue.

Ayer has not done any act to further the alleged restraints upon production and marketing of diamonds, or to further the alleged purpose thereof, and has not in any way put the alleged conspiracy into operation, made it effective, or carried it out.

It is true that Ayer, pursuant to its contract with De Beers, has conducted and now carries on an advertising and publicity campaign in the United States. It is not true that Ayer is the agent of De Beers for this purpose. Ayer performs this service as an independent contractor, as stated above. It is true that one object of this campaign is to induce the consuming public in the United States to believe that diamonds are naturally rare and valuable, which they are in fact. It is not true that one of the objects of this campaign is to induce the consuming public in the United States to believe that diamonds are inherently worth the retail prices quoted in the advertisements. Nor is it true that De Beers has suggested, tampered with, fixed, or maintained, or is suggesting, tampering with, fixing, or maintaining the United States retail prices of gem diamonds by advertising in the United States the maximum and minimum retail prices for gem diamonds of different weights.

Why Diamond Prices Are Quoted in Advertisements

The only purpose of the references to prices in the advertising has been to inform the consuming public as to what retail jewelers in the United States were currently charging for quality cut gem diamonds of the sizes shown in the advertisements.

When Ayer made its above-mentioned survey of the American cut gem diamond market in 1939 for use in planning a diamond advertising and publicity campaign, Ayer's investigators carried a jewel box containing 5 imitation cut gem

diamonds, approximately ½ carat, ¾ carat, 1 carat, 1½ carats, and 2 carats, respectively, in size. The investigators asked each person interviewed to estimate the carat size of the imitation diamonds, and to estimate the current retail prices for diamonds of each size. Very few persons were able to make such estimates with any reasonable degree of accuracy.

In view of the prevailing ignorance about diamond sizes and current retail diamond prices, Ayer concluded that an advertising and publicity campaign, educational in character, to stimulate retail cut gem diamond sales, could not be fully effective unless the advertisements used in the campaign contained information about diamond sizes and prices.

Ayer also believed that the advertising of price quotations was necessary to give the consuming public some idea of what it would cost to realize ownership desire stimulated by the advertising. This practice is common to most consumer advertising. De Beers objected strongly to the incorporation of price information in advertisements, on the ground that De Beers sells only rough diamonds, and not only has no control over retail prices of the ultimate product but believed those prices to be too high. Ayer, believing in the correctness of its position, advised De Beers that it would not be willing to handle the advertising campaign unless price quotations could be used. De Beers withdrew its objection upon Ayer's assurance that the price quotations would be verified by thorough investigation.

It thus happened that Ayer has incorporated in all consumer advertisements published for De Beers facsimiles of cut gem diamonds of several different sizes, together with the average current minimum and maximum retail prices for quality diamonds of each size, and an explanatory statement substantially as follows:

> "Facts about diamonds: These are average current prices for unmounted quality diamonds. Add 20% for federal tax. (The exact weights shown occur infrequently.) Size alone does not determine diamond values. Color, cutting, brilliance and clarity have an

equally important bearing. You should have a trusted jeweler's best advice when buying diamonds."

De Beers has never been favorably disposed to the idea of including retail price quotations in advertisements, and has from time to time reopened the question as to the wisdom of so doing. This is mentioned in the following contemporaneous memoranda made by me as a vice-president of Ayer:

(1) Memorandum dated April 28, 1941:

"Mr. Dickinson [a director of De Beers] has wanted to eliminate prices from advertisements. He has given in on our insistence that prices should be in, with the proviso that we will check once more both Retail and Wholesale diamond prices * * *."

(2) Memorandum dated Nov. 30, 1944:

"When the writer was in South Africa [in July, 1944], Mr. Harry Oppenheimer as well as Sir Ernest had about made up their minds that we should not carry prices in the advertising. Their main reason was that the prices to be carried in the advertising were much too high. As a matter of fact, they questioned the accuracy of our prices.

"After thorough discussion of the policy involved, I received their permission to continue to show prices which were obtained in the same manner as they had been obtained in the past. * * *

"As the writer reported in the Creative Production Board meeting, Sir Ernest Oppenheimer cannot understand how the prices get as high as they do, for the sale of polished goods at retail in the United States. He recognizes that there must be considerable inefficiency in the distribution system which is in very little manner affected by their pricing policy."

Although De Beers considered the prices quoted in the advertisements to be too high, many retail jewelers and wholesale dealers in diamonds have complained to Ayer that these prices are too low.

The price quotations in said advertisements merely represent the average price ranges of cut gem diamonds being

currently charged by the retailers. It is not possible, in the light of the many thousands of competitive retail dealers in diamonds, that said price quotations could have the effect of fixing or maintaining such retail prices, and the price quotations were not used for any such purpose.

That the description of sizes and prices in the advertising could not possibly have had either the object or the effect of tampering with or fixing or maintaining prices is evident from the very wide range of prices set forth in the advertisements themselves. For example, the advertisements now being published state "average current prices for unmounted quality diamonds" as follows: one-quarter carat, $85 to $200; one-half carat, $190 to $375; one carat, $540 to $835; two carats, $1375 to $2300.

The diamond mines can be operated profitably only on a volume basis. Any advertising policy on the part of De Beers having the effect of supporting unreasonably high retail prices for cut gem diamonds would ultimately cause a reduction in the volume of sales of rough diamonds, with the result that the mines would have to stop production or operate at a loss.

Ayer's Investigation of Retail Prices

Because of the fact that the inclusion of these price descriptions in the advertisements was contrary to the wishes of its client, De Beers, and was consented to by the client only upon Ayer's assurance that such price descriptions would be wholly accurate, Ayer has constantly kept itself informed as to the current range of retail prices throughout the United States. That, and that only, has been the purpose of the investigation by shoppers mentioned in paragraph 57(b) of the complaint.

These investigations have been made for Ayer by three independent services, Elmo Roper, Willmark Research Corporation and Jewelers' Circular-Keystone, as well as by members of Ayer's own staff.

At least eight surveys have been conducted for this purpose during the 4½ years in which the consumer advertising has appeared. Each survey was conducted in many cities and included reports from twenty to fifty jewelers.

Ayer's Reports on Government Price Regulations

It is true that Ayer has reported to De Beers on United States Government price regulations for diamonds. These reports consisted of a few letters and telegrams sent by affiant to H. T. Dickinson at Johannesburg, South Africa, during the period from September, 1942, to August, 1943, on the subject of ceilings fixed by the Office of Price Administration on prices of diamonds. Such ceilings were fixed during 1942, and Dickinson asked affiant for information about them. That the information was not sought for use in an attempt to fix or increase diamond prices in the United States is shown by a letter of Dickinson to affiant, dated at Johannesburg, October 1, 1943, in which Dickinson said:

> "I have your air mail letter of the 24th August reporting that the Office of Price Administration had removed all ceilings on gem stones.
>
> "As mentioned in previous correspondence we are somewhat alarmed at the unjustified increase in the prices of gem stones, but there is very little we can do about it owing to the number of intermediaries interested."

Ayer's Reports on Complaints

In 1943, Ayer heard of complaints made by certain users of industrial diamonds in the United States who were not customers of Diamond Trading Company, Ltd. Ayer discussed these complaints with a diamond dealer in New York who was a customer of Diamond Trading Company, Ltd., and he, too, voiced some dissatisfaction. Thereupon Ayer, upon its own initiative, reported these complaints to De Beers. Subsequently affiant, at the request of Dickinson, inquired of the War Production Board as to its attitude

toward such complaints and reported the results to Dickinson. On no other occasion has Ayer reported to De Beers on complaints by a user or customer of Diamond Trading Company, Ltd.

Ayer's Reports on the Diamond Cutting Industry

It is true that Ayer has reported to De Beers on the numbers, wages, hours, and union membership of diamond cutters in New York and Philadelphia. Ayer made such reports by cables and letters sent to Dickinson at Johannesburg, at Dickinson's request, in February, March and April, 1943. The reason for Dickinson's request is shown by the following extract from a letter from him, dated at Johannesburg, South Africa, April 9, 1943, and addressed to affiant:

> "The reason for our request was that there has been some agitation here in connection with the wages paid to South African Cutters. Continuous applications are being made by the Cutting employees for increased wages and the matter was finally brought to the attention of the Minister of Mines, who, of course, is very interested in the expansion of the Cutting Industry in South Africa. The Minister requested the Diamond Producers Association to advise him of the position, and for this purpose it was thought advisable to obtain the scale of wages paid in the United States and other countries. With the information given by you and from other sources, a memorandum has been prepared and sent to the Minister, but I do not believe that this will be of great assistance to him in dealing with the position in South Africa.
>
> "I may add that the Producers are deeply interested in the cost of cutting of rough diamonds, for this must affect the price of diamonds to the consumer. However, in these times very little can be done by us to keep Cutters' wages within reasonable bounds, as it is fairly evident that the Master Cutters must be making very substantial profits, or they could not meet the numerous demands for higher scales."

Ayer also reported on the diamond cutting industry in July, 1944, when Ayer cabled an answer to an inquiry from

De Beers as to whether the wages of diamond cutters in the United States had been reduced. Ayer also at infrequent intervals advised De Beers on the estimated number of diamond cutters working in the United States.

Except as stated above, Ayer made no reports on the aforesaid topics.

The Publicity Campaign and Alleged Activities of Ayer for the Purpose of Discouraging, Eliminating and Counteracting Publicity unfavorable to or Critical of De Beers and its Subsidiaries

In Ayer's report of April, 1939 to De Beers under the caption "Publicity Plan for the Promotion of Diamonds in the United States", Ayer outlined the nature and object of the publicity program as follows:

> "Publicity, as we define it, consists of news and feature material that is interesting and informative enough to be accepted on its own merits by editors of magazines and newspapers, by radio or wireless stations, and by motion picture producers. The publicity should have the same objective as your advertising—the creation of greater interest in and acceptance of diamonds. Thus advertising and publicity will work hand in hand, each a separate and distinct activity, yet the two joined to attain the same end. * * *"

The news and feature material referred to in the foregoing extract from Ayer's report was either prepared by Ayer or based on ideas furnished by Ayer to others. The subject matter is designed to arouse interest in cut gem diamonds, to make them more popular, to make the wearing of them more fashionable, and thus to induce the consuming public to purchase diamond jewelry from retail jewelers. This news and feature material has often related to such matters as mining, cutting and polishing of diamonds, the uses of diamonds for personal adornment and in industry, and the importance of diamonds in the war effort, but the object has always been the same—to stimulate interest in,

and retail sales of, cut gem diamonds. Ayer has never induced any publisher not to publish an article. In order to assure accuracy in news and feature material prepared by others, and to eliminate statements therein which might adversely affect the popularity of diamond jewelry, Ayer has often made suggestions to writers, editors or publishers for the correction or modification of their news and feature material relating to diamonds or the diamond industry. Ayer considered publicity unfavorable to De Beers or others engaged in the diamond industry to be publicity which might adversely affect the popularity of diamond jewelry. In a few instances Ayer's suggestions for changes related to De Beers or its subsidiaries. Some, but not all, of those suggestions were adopted.

Other Services of Ayer

It is true that other services, mentioned but not specified in clause (b) of paragraph 57 of the complaint, have been performed by Ayer in the United States for De Beers. The only services not directly connected with the advertising or publicity campaign and not heretofore mentioned in this affidavit were the following:

(a) Sending to De Beers occasionally information, newspaper clippings, magazines, or other publications, containing news relating to diamonds or other minerals, which affiant thought might be of interest to De Beers.

(b) Obtaining copies of 4 patents from the Patent Office, requested by De Beers in 1944.

(c) Binding a report by Lute J. Parkinson in 1944, for which De Beers reimbursed Ayer.

(d) Doing minor personal favors from time to time for officers or employees of De Beers while they were in the United States.

(e) Obtaining office space and providing stenographic service for De Beers in 1941 under the following circumstances: As an accommodation to De Beers, Ayer obtained in its own name "permission to occupy, temporarily," from time to time from March 24, 1941 to September 8, 1941, approximately 200 square feet of space at 30 Rockefeller Plaza, New York City, ostensibly for the use of Ayer, but actually, with the knowledge and consent of the landlord, for use as a place for sorting diamonds. S. H. Routley, an employee of one of said three defendants, was in charge of this sorting. Secrecy as to the purpose for which the space was to be used was necessary for the protection of the diamonds. Ayer was reimbursed by De Beers for the amount paid ($40 per month) for the use of this space, but Ayer received no compensation for services in this connection. Ayer also provided stenographic help, for which Ayer was reimbursed by De Beers.

(f) As a business courtesy, furnished Sir Ernest Oppenheimer, Harold T. Dickinson, John Morrison, Stanley H. Routley, Harry Nicholson, and L. J. Parkinson desk space and telephone and stenographic service at the Ayer office, 30 Rockefeller Plaza, New York, N. Y., for their use while on their visits to the United States as hereinafter described. No charge was made for such services.

Activities of Representatives of De Beers and its Subsidiaries in the United States

It is not true that De Beers and its subsidiaries regularly and continuously have sent and now send representatives to the United States to investigate and report on market conditions, to arrange for and supervise the advertising and publicity campaign, or to investigate complaints.

To the best of the knowledge and belief of affiant (and affiant believes that his knowledge is accurate), the only persons having any connection with any of said three defendants who have been in the United States since 1938, and the time and purpose of their presence here, have been as follows:

Sir Ernest Oppenheimer.

He was here for about three months in 1940 for the purpose of assisting the United States Government to obtain a stockpile of industrial diamonds for war purposes.

Harry A. Oppenheimer.

He was here in 1938 for the purpose of making arrangements for the De Beers exhibit at the New York World's Fair of 1939.

Harold T. Dickinson.

He was here from March until September, 1939, for the purpose of having a holiday here and assisting in the arrangements for the De Beers exhibit at the New York World's Fair of 1939. He was also here from February, 1941 until July, 1942, for the purpose of facilitating the procurement of industrial diamonds by the United States Government for war purposes. During his stay he had a serious operation at the Johns Hopkins Hospital, and an attack of pneumonia, for which he was treated at the Jackson Heights Hospital. He was ready to leave in the fall of 1941 but was unable to obtain passage to South Africa until July 1942 due to wartime travel conditions. He spent some of his time at resort hotels in Florida, at Sky Top, Pa., and other resorts.

Fergus Rogers.

He was here in 1939 for the purpose of attending to the De Beers exhibit at the New York World's Fair of 1939.

Lute J. Parkinson.

He was a mining engineer who had been a General Manager in charge of mining operations in South Africa. Upon terminating that employment with De Beers, he came to this country, where he was retained by De Beers to make a study and report of the industrial diamond trade. He completed that report in January, 1944, after which, I am informed, and believe, he had no relationship whatever with De Beers.

John Morrison.

He came here late in 1940 for the purpose of assisting in the procurement of industrial diamonds by the United States Government for war purposes and also in connection with a study then being made as to whether De Beers or one of its subsidiaries would organize a corporation in New York to do business in rough diamonds in the United States. The corporation was not organized and affiant was advised that De Beers had determined to do no business in the United States even through a subsidiary. He remained here for a time in 1941. His departure was delayed by the fact that he was ill, in a hospital in Westchester County, for several months.

Harry Nicholson.

He was a diamond sorter and was here late in 1940 and for most of 1941 for the purpose of sorting diamonds in connection with the procurement of industrial diamonds by the United States Government for war purposes.

S. H. Routley.

He was a diamond sorter employed by one of said three defendants. He was here late in 1940 and for most of 1941 for the purpose of sorting diamonds in connection with the procurement of industrial diamonds by the United States Government for war purposes. He was also in the United States in December,

1944, when his wife came to New York City for medical attention, and in the course of his visit he collected the copies of the Parkinson Report and related material which had been left with Ayer by Parkinson when he severed his relationship with De Beers and left for South America.

(signed) WARNER S. SHELLY

Sworn to before me this
23rd day of March, 1945.

PAUL J. CHASE
Notary Public

PAUL J. CHASE
Notary Public, Westchester County
N. Y. Co. Clk's No. 1020, Reg. No. 626-C-6
King's Co. Clk's No. 206, Reg. No. 406-C-6
Commission Expires March 30, 1946

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *Plaintiff,* *against* DE BEERS CONSOLIDATED MINES, LTD., *et al.*, *Defendants.*	Civil No. 29-446

AFFIDAVIT OF PAUL J. TIMBAL

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

PAUL J. TIMBAL, being duly sworn, deposes and says:

Since 1937 I have been Managing Director (i.e., chief executive officer) of Banque Diamantaire Anversoise, Société Anonyme, Antwerp, Belgium (hereinafter referred to as the Bank). The Bank was organized in 1934 under the laws of the Kingdom of Belgium under the name of Comptoir Diamantaire Aversois, Société Anonyme, which was changed in July, 1937, to Banque Diamantaire Anversoise Société Anonyme.

The authorized and issued capital stock of the Bank is 60,000,000 in Belgian francs, which is represented by 60,000 bearer shares of stock without par value. Upon information and belief, based upon my knowledge of the Bank's affairs, the shares of the Bank are held by the following in approximately the amounts set forth below:

Kredict Bank voor Handel on Nyverheid— Brussels	13,500 shares
Societe Belge de Banque Brussels	10,000 "
Group of Mr. Paul J. Timbal	10,000* "

*None of the owners of the shares of the Timbal group has any connection with De Beers Consolidated Mines, Ltd., Diamond Corporation, Ltd., or Diamond Trading Co., Ltd. The voting rights of these shares are customarily exercised by myself.

Societe Forestiere et Miniere du Congo.....	6,000	shares
Compagnie Financiere et Industrielle "Confinindus"—Brussels	6,000	"
Banque Transatlantique Paris.....	4,000	"
Diamond Corporation, Ltd.....	2,500	"
De Beers Consolidated Mines, Ltd.....	2,450	"
William A. Chapple and G. Tooth—London	1,950	"
Jac Jolis—New York, N. Y.....	1,300	"
Miscellaneous	2,300	"
Total	60,000	"

The directors and principal executive officers of the Bank are as follows:

Chairman of the Board: Mr. Albert Edouard Janssen, President of the Societe Belge de Banque, Brussels.

Vice-Chairman: Mr. Phillipe Van Isacker, Vice-President of the Kredietbank voor Handel en Nijverheid, Brussels.

General Sir John Pb. DuCane, G.C.B., Deputy Chairman of the De Beers Consolidated Mines, Ltd., London.

Managing Director: Mr. Paul J. Timbal, Director of the Societe Belge de Banque, Brussels.

Directors: Mr. Suchet, Manager of Banque Transatlantique, Paris.

Mr. William A. Chapple, Manager of the Diamond Trading Co., Ltd., London.

Mr. Joseph Dewyspelaere, Commercial Manager of the Societe Internationale Forestiere et Miniere du Congo, Brussels.

Baron Paul Houtart, Bank Director, Brussels.

Of the eight persons who are directors of the Bank, only two, General Sir John Ph. DuCane, Deputy Chairman of De Beers, and Mr. William A. Chapple, Manager of Diamond Trading, have any connection with the defendants De Beers Consolidated Mines, Limited, Diamond Corporation, Limited or Diamond Trading Company, Limited (hereinafter referred to respectively as De Beers, Diamond Corporation and Diamond Trading), service upon which defendants was purported to have been made by service upon the Bank.

Although the Bank under its charter is authorized to do a general banking business, the field of its activity has been largely in the financing of the operations of the Bank's customers engaged in the diamond trade and industry. Prior to the invasion of Belgium in May, 1940, Belgium was one of the principal centers of the Diamond industry, and the cutting of diamonds was almost entirely confined to Belgium and Holland and certain parts of Germany. Until the issuance of a license in 1941 to the Bank to do business in New York, as hereinafter described the only office of the Bank was in Antwerp, Belgium.

The principal business of the Bank in Antwerp consisted in financing for its customers the import of uncut diamonds from London, South Africa, and certain parts of South America to the principal cutting centers, the cutting of the diamonds so imported and the export of the cut diamonds chiefly to the United States of America, South America, India, and the Netherlands Indies. This financing took the form of loans to importers to enable them to purchase uncut diamonds, the diamonds being pledged as security for the loans, and the discounting or rediscounting of notes of the purchasers of the cut stones.

After the fall of Belgium and France I came to New York in 1940 for the purpose of establishing an office of the Bank here in order to continue its business, since a considerable number of the Bank's customers had come to the United States and established themselves in New York City. Thereafter, on May 16, 1941, the Superintendent of Banks

of the State of New York, issued a license authorizing the Bank to transact a limited banking business in New York. This license, originally issued for a period of three months, has since been renewed from time to time and is still in effect.

On June 30, 1941 I opened an office for the transaction of the Bank's business at 630 Fifth Avenue, New York City. In accordance with the practice of the New York State Banking Department with respect to foreign banks, licensed to transact business in this State, the aforesaid office operates under the designation of the New York Agency of the Bank and is hereinafter referred to as the Agency of the Bank or the Agency.

Since the establishment of the Agency of the Bank in 1941, in addition to concerning itself with the management and the recovery of the assets of the Bank, which were located to a large extent in the United States, said Agency has financed for the Bank's customers the purchase of diamonds and watches abroad by means of loans to said customers in the United States and has financed local purchases and sales of diamonds in the United States between local dealers.

Approximately fifty per cent. of the Bank's business in New York, since the establishment of its agency in 1941, has been the financing of local transactions in diamonds between local New York dealers and merchants, of the purchase of cut gem and rough uncut diamonds in Palestine and South Africa, of the purchase of synthetic and semi-precious stones in Bermuda, and of the purchase of watches in Switzerland; the balance having been the financing for local New York buyers of the purchase by them of rough uncut diamonds in London, England, from Diamond Trading and others.

The method generally by which the Agency finances the importation of diamonds purchased by customers of the Bank (hereinafter referred to as the customer) from Diamond Trading and the steps by which it is carried out, are as follows:

(1) The customer, after making his arrangements to purchase in London through his broker there, by letter requests the Agency to advance to the customer and, for his account, to pay to the Federal Reserve Bank of New York a stated sum of money for the account of a named English bank in favor of Diamond Trading, which sum represents the purchase price of diamonds and the cost of insurance and postage thereon from London to New York. The customer executes a note in favor of the Agency, pledges the diamonds as collateral security for the payment made by the Agency, and agrees that the diamonds be sent directly to the Agency for the account of the customer.

(2) The Agency pays to the Federal Reserve Bank in New York the amount requested by the customer with instructions to transmit the funds to England for the account of the customer. The Agency charges the amount of the payment to the customer's advance account, discounts the notes received from the customer representing the advance and credits the proceeds to the customer's advance account. At the same time the Agency cables to Mr. William A. Chapple in London, one of the directors of the Bank, advising him that the Agency has paid the Federal Reserve Bank in New York for the account of the customer and instructing that the diamonds be sent directly to the Agency for the customer's account.

(3) Mr. Chapple transmits a copy of the cable mentioned in (2) to Diamond Trading and Diamond Trading acknowledges to the Agency of the Bank that it has been credited with the amount transmitted by said Agency and advises that Diamond Trading is sending the diamonds purchased to the Agency for the customer's account.

(4) The diamonds are insured in London at the expense and in favor of the customer. Commercial and consular invoices are made out in London in the name of the customer as purchaser and the diamonds are sent by Diamond

Trading to and received by the Agency for the account of the customer. If the customer wishes to take possession of the diamonds from the Agency before repaying his indebtedness, he signs a trust receipt obligating him to hold them or the proceeds thereof in trust for the Agency and upon the sale thereof his loan with the Agency is liquidated. Otherwise the diamonds are held by the Agency as collateral security for the loan until it is paid. The diamonds are sent to the Agency instead of the customer solely at the Agency's request pursuant to its agreement with the customer in order to protect its lien on the diamonds.

Upon payment of the purchase price, cost of insurance and postage in London to Diamond Trading, the diamonds purchased become the property of the customer subject to the Bank's lien thereon and Diamond Trading thereafter has no interest therein. The Agency receives the diamonds as bailee of the buyer, the customer of the Bank, and as pledgee of the diamonds to secure repayment of advances by the Agency.

When the credit standing of the customer justifies an unsecured loan the Agency either (a) advances the money to him without collateral, remitting the funds for his account to London for the purchase of diamonds, and the diamonds are sent directly to the customer, or (b) advances the money to the customer and he himself remits the funds to London, in which case also the diamonds are sent directly to the customer.

The greater part of the diamonds purchased in London by the Bank's customers have been purchased by them from Diamond Trading. Diamond Trading has from time to time inquired of the Agency of the Bank concerning the trade and financial standing of prospective New York diamond buyers and the Agency has furnished such information. The Agency is under no obligation to furnish such information or to make investigations for Diamond Trading and has furnished such information because it is in the Bank's interest, wherever possible, to see that its prospective customers are

able to purchase diamonds when their standing so warrants, in order that the Bank may make loans to them for that purpose.

Neither I nor any of the Agency's employees has or ever had any connection with any of the defendants, De Beers, Diamond Corporation or Diamond Trading. None of the diamonds delivered to the Agency was received by it to be distributed as agent for Diamond Trading to the purchasers thereof. Neither the Bank nor the Agency is or ever has been an agent of any of the defendants, De Beers, Diamond Corporation or Diamond Trading in any respect nor has any of those defendants ever authorized the Bank or the Agency to receive process in suits brought in the State of New York or elsewhere against any of them.

P. J. TIMBAL

Sworn to before me this
21st day of March, 1945.

DAVID SCHAPIRO
Notary Public

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,
against
DE BEERS CONSOLIDATED MINES, LTD., *et al.*,
Defendants.

AFFIDAVIT OF SYDNEY H. BALL

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

SYDNEY H. BALL, being duly sworn, deposes and says:

I am a mining engineer and geologist and a member of the firm of Rogers, Mayer & Ball, mining engineers, with offices at 26 Beaver Street, New York City. Since 1909, I have been actively engaged in the practice of my profession in New York City and have had extensive training and experience in connection with diamonds and other precious stones in addition to a general practice as to metals and other minerals. I have been President of the Society of Economic Geologists, President of the Mining and Metallurgical Society of America, director of the American Institute of Mining and Metallurgical Engineers, and I am now President of the Mining Club in New York City.

In addition to my general practice as a mining engineer I am consulting geologist for Societe Internationale Forestiere et Miniere du Congo, and consulting diamond editor of the Jewelers' Circular-Keystone. Until recently, I served three days a week in Washington as Special Assistant to the Director of the Raw Materials Division of the War Production Board.

As a result of my interest in gems and my knowledge of the gem industry, I have been and am well acquainted with

leading jewelers and others in the gem industry. As a result of this acquaintance and interest, in 1938, when the organization of the New York Worlds Fair which opened in 1939, was in progress, I, with others, was instrumental in arousing interest among leading Fifth Avenue (New York City) jewelers in presenting an exhibit of precious stones and jewelry at the Fair. These jewelers, Tiffany & Co., Cartier & Co., Black, Starr & Frost-Gorham, Inc., Marcus & Co., and Udall & Ballou, decided to present an exhibit which was named the House of Jewels. The jewelers interested De Beers Consolidated Mines, Ltd. in participating in the exhibit and as a result of suggestions by the jewelers to De Beers, De Beers requested me to represent its interests until one of its representatives could be sent over to the United States to take care of its interest in the exhibit. This I agreed to do and I attended meetings of the jewelers and kept De Beers informed thereof until its representative at said exhibit, Mr. Fergus S. C. Rogers, arrived in the United States in January, 1939. Thereafter Mr. Rogers represented the interests of De Beers, and I advised with him from time to time until the opening of the Fair in 1939.

Prior to the arrival of Mr. Rogers I paid De Beers' share of the expenses in connection with the projected jewelers' exhibit, such as rent for space at the Fair, etc., from funds in the Standard Bank of South Africa, New York Agency, standing to the credit of De Beers as to which I had a power of attorney. Soon after the arrival of Mr. Rogers, I withdrew the balance of the funds in that account and turned it over to him. For a short time prior to the reopening of the Fair in 1940, I, on behalf of De Beers, attended meetings of representatives of the jewelers who were participating in the Worlds Fair. After the arrival of the De Beers representative, I ceased to engage in any activities on behalf of De Beers.

In recognition of my services in connection with the organization of the jewelers' exhibit in 1938 and the early part of 1939, De Beers paid me an honorarium on August 29, 1939

For my activities in connection with the Fair in early 1940, I received no remuneration.

In October, 1940, De Beers offered to pay me a yearly fee if I would make periodic reports to De Beers of current information regarding the American diamond industry. I accepted that offer and since November 11, 1940, have mailed to De Beers in Kimberly, South Africa, periodic surveys of the diamond industry in North America. These surveys contain general information, available to anyone, from trade journals, financial papers and the daily papers concerning American business conditions, Canadian business conditions, American wholesale jewelry sales, Canadian jewelry sales, the amounts of United States and Canadian diamond imports (as the figures for such imports are released by the respective governments), diamond cutting, diamond prices and diamond consumption. My initial contract with De Beers covered a period of two years, ending October 31, 1942. It was thereafter renewed from year to year and is presently in force, to expire October 31, 1945, subject to renewal. In this work I have been retained by De Beers as an expert just as any professional expert is retained, and am in no sense an employee or agent subject to their domination or control. The material contained in the surveys, and the method of presenting it, is determined entirely by myself.

Neither I nor any member of my firm nor the firm itself has ever been an officer, director or employee of De Beers Consolidated Mines, Ltd., The Diamond Corporation, Ltd., or Diamond Trading Company, Ltd., nor have I, nor said firm nor any member thereof, been authorized by any of them as agent to receive process in suits brought in the State of New York or elsewhere.

SYDNEY H. BALL

Sworn to before me this
8th day of March, 1945.

WILLIAM J. BRENNAN
Notary Public

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,

v.

DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD., DIAMOND TRADING COMPANY, LTD., SOCIETE GENERALE DE BELGIQUE, SOCIETE MINIERE DU BECEKA, SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO, COMPANHIA DE DIAMANTES DE ANGOLA, CONSOLIDATED AFRICAN SELECTION TRUST, LTD., SIERRA LEONE SELECTION TRUST, LTD., RUSSELL JOHNSON PARKER, LUTE J. PARKINSON, HERBERT H. VREELAND, ALBERT E. THIELE, SOLOMON R. GUGGENHEIM, CLENDENIN J. RYAN, AND GEORGE K. STURM,
Defendants.

Civil No. 29-446

AFFIDAVIT

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

ROBERT T. SWAINE, being duly sworn, deposes and says:

I am a member of the law firm of Cravath, Swaine & Moore, 15 Broad Street, New York, N. Y., which, on the afternoon of February 1, 1945, was retained, as the result of a cable from Johannesburg, Union of South Africa, to advise the defendants De Beers Consolidated Mines, Ltd. (hereinafter called De Beers), Diamond Corporation, Ltd. (hereinafter called Diamond Corporation), and Diamond Trading Company, Ltd. (hereinafter called Diamond Trading).

Paragraph 18 of the complaint herein reads as follows:

> "18. Lute J. Parkinson, a resident of New York City, is made a defendant. He is now and for many years has been assistant general manager and an agent of De Beers."

In view of this allegation I at once sought to ascertain the whereabouts of and make contact with Mr. Parkinson, but was unable to establish such contact until late in the afternoon of Saturday, February 3. I then was told that he was registered at the Hotel Royalton on West 44th Street, New York City. On telephoning that Hotel and asking to be connected with Mr. Parkinson, a gentleman answered the telephone and advised me that he was Mr. Parkinson, but expressed great surprise and concern that I had learned of his whereabouts. I explained that I was counsel for the three defendants above named, told him of the allegation in paragraph 18 of the complaint, and asked if he would see me. He told me that he was the Mr. Parkinson referred to but that he was not and had not been for some time Assistant General Manager and had never been an agent of De Beers in this country. After further discussion he agreed to see me.

I then went to the Hotel Royalton, asked the telephone operator at the lobby desk to connect me with Mr. Parkinson, and on being connected, spoke to a gentleman with the same voice as the one with whom I had previously talked. Within a few minutes a gentleman emerged from the elevator and introduced himself to me as Mr. Parkinson. He suggested that we should go somewhere else to talk. Accordingly, we crossed the street to the Hotel Algonquin, also on West 44th Street.

Mr. Parkinson said he was planning immediately to leave the United States and that he did not want to get mixed up in this litigation as he knew nothing about it, and he did not want it by any possibility to interfere with his work in South America.

I handed him a copy of the complaint, reading to him particularly paragraphs 18 and 20, and summarizing for him the contents of the other paragraphs.

He told me that on completing his technical training in the United States he went to Africa in 1923 as a mining engineer and there engaged in the practice of his profession until August, 1943; that he was first employed by De Beers in 1936 as Assistant General Manager in charge of mining operations at Kimberley, Union of South Africa; that his duties and authority were confined solely to mining operations; that he had no duties or authority in connection with the marketing of products of the mines, or with the contractual relationships between De Beers and other corporations, or otherwise in connection with the direction or management of the affairs of De Beers or of any of the corporations associated with it; and particularly that he had no duties or authority or any connection with any of the defendants described in the complaint except only the one report hereinafter mentioned.

He told me that in August, 1943, he terminated his work as Assistant General Manager of the mines at Kimberley and came to the United States; that he was retained by De Beers to make a study of and report on the use of industrial diamonds and the market therefor in the United States; that he made such a study and report and concluded all his activities in connection therewith during the month of January, 1944; and that on January 31, 1944, he ceased to have any connection of any nature whatsoever with De Beers or any corporation associated with it and since that date has had no such connection.

He exhibited to me an original letter dated in January, 1944, on De Beers' letterhead and purporting to be signed on behalf of De Beers, which confirmed the termination of his employment by De Beers as of January 31, 1944, and contained expressions of commendation for his services to De Beers.

He told me that at no time had he ever had any connection of any kind with Diamond Corporation or Diamond Trading.

He also told me that since January, 1944, he had been employed by American corporations in no way connected with De Beers, in connection with copper mining operations, largely in South America, and that he was planning immediately to leave for Chile.

I asked him if he would give me an affidavit covering the matters which he had told me. He said that he wanted to consult someone on the legal staff of his present employer before making such an affidavit, said he would do so on Monday morning, February 5, 1945, and get in touch with me during that day. When I did not hear from him on Monday I made an effort to reestablish contact but was unable to reach him or get any information about him either at the Hotel Royalton or at the office of the corporation which he had told me was his present employer, except that on my telephone call to the latter office another person, whose voice I am sure was not that of the gentleman I had previously spoken to, told me that Mr. Parkinson had decided that he did not want to execute any affidavit and expected to be on his way to South America within 24 hours.

ROBERT T. SWAINE

Sworn to before me this 7th day of February, 1945.

THOMAS E. McGUIRE
Notary Public.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *Plaintiff,* *against* DE BEERS CONSOLIDATED MINES, LTD., *et al.*, *Defendants.*	Civil No. 29-446

AFFIDAVIT OF JOHN PRENTICE

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

JOHN PRENTICE, being duly sworn, deposes and says:

I am a Second Vice-President of The Chase National Bank of the City of New York, 18 Pine Street, New York, N. Y.

I have caused the records of the bank to be examined for the purpose of ascertaining whether DeBeers Consolidated Mines, Ltd. maintains or has maintained an account with the bank. Said examination does not reveal that an account is now or has been in the past, maintained with the bank in the name of DeBeers Consolidated Mines, Ltd., nor do the records of the bank show that DeBeers Consolidated Mines, Ltd. has or had an interest in any account maintained at present or in the past with the bank.

JOHN PRENTICE

Sworn to before me this 15th day of March, 1945.

HENRY P. SCHOERRY
Notary Public

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *Plaintiff,* *against* DE BEERS CONSOLIDATED MINES, LTD., *et al.*, *Defendants.*	Civil No. 29-446

AFFIDAVIT OF E. D. EVANS

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

E. D. EVANS, being duly sworn, deposes and says:

I am New York Agent of Barclays Bank (Dominion, Colonial and Overseas), 120 Broadway, New York City.

I have caused the records of the Agency to be examined for the purpose of ascertaining whether or not De Beers Consolidated Mines, Ltd. has or ever had an account or accounts with the New York Agency of the Bank. Such examination reveals that De Beers has never had and does not at present have any such account with the Agency, nor is there anything in the Agency's records to indicate that De Beers had or now has any interest in any accounts maintained with the Agency in any other name.

E. D. EVANS

Sworn to before me this 16
day of March, 1945

WILLIAM E. RICHMOND
Notary Public

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *Plaintiff*, *against* DE BEERS CONSOLIDATED MINES, LTD., *et al.*, *Defendants*.	Civil No. 29-416

AFFIDAVIT OF H. H. CASS

STATE OF NEW YORK, COUNTY OF NEW YORK; } ss.:

H. H. CASS, being duly sworn, deposes and says:

I am the New York Agent of The Standard Bank of South Africa, Ltd., 67 Wall Street, New York City.

I have caused the record of the Bank to be examined for the purpose of ascertaining whether or not De Beers Consolidated Mines, Ltd., had or has an account or accounts with the Bank. Such examination reveals the following:

De Beers opened an account with the Bank on April 12, 1938, which account was closed May 10, 1939. Thereafter De Beers opened another account on December 21, 1939, with a telegraphic transfer of approximately $137,000. This balance was subsequently increased to approximately $265,000 and thereafter reduced to approximately $190,800 on April 30, 1940, by payments made upon cable instructions from De Beers. The balance of approximately $190,000 remained until March 30, 1942, beginning at which time monthly payments were made upon cable instructions from De Beers throughout the year 1942, the entire balance being paid out on December 31, 1942. Thereafter no balance was kept in the account, but De Beers cabled monthly remittances to

the Bank which were paid out upon cable instructions within a few days after receipt of the remittances, with the exception of a balance of approximately $6,700 which remained in the account from March 8, 1944, until June 30, 1944.

At present there is standing to the credit of De Beers with the Bank the sum of $59,321 which represents a cable remittance from De Beers received by the Bank on January 29, 1945, which sum would have been paid out a few days after its receipt were it not for a restraining order issued by the United States District Court, Southern District of New York, on January 29, 1945, and amendments and modifications thereof served upon the Bank.

Accounts have been maintained by the following individuals as to whom the Bank's information is that they had some connection with De Beers:

An account entitled "F. S. C. Rogers (Exhibition Account)" was opened on January 16, 1939, and closed May 17, 1940.

An account entitled "F. S. C. Rogers (Boart Products, Ltd., Account)" was opened February 27, 1939, and closed July 24, 1941.

An account entitled "H. Simpson Exhibition a/c" was opened on April 27, 1940, and closed April 8, 1941.

An account in the name of John Morrison was opened on June 27, 1940, and closed April 1, 1941.

An account entitled "H. T. Dickinson "Publicity Account"" was opened on December 26, 1940, and closed March 8, 1944.

An account entitled "H. T. Dickinson D. B. Account" was opened on April 1, 1941, and closed March 8, 1944.

No other accounts have been or are maintained with the Bank as to which, so far as the Bank's records show, De Beers had or has any interest.

H. H. Cass

Sworn to before me this
16th day of March, 1945.

Thomas E. McGuire
Notary Public.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *Plaintiff,* *against* DE BEERS CONSOLIDATED MINES, LTD., *et al.*, *Defendants.*	Civil No. 29-446

AFFIDAVIT OF HENRY E. DODGE

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

HENRY E. DODGE, being duly sworn, deposes and says:

I am Secretary and Treasurer of Newmont Mining Corporation, 14 Wall Street, New York, N. Y.

De Beers Consolidated Mines, Ltd. does not maintain nor has it at any time maintained an office or office space at Newmont Mining Corporation. At the request of and as a courtesy to Sir Ernest Oppenheimer the Corporation permitted Mr. L. J. Parkinson, formerly Assistant General Manager of De Beers Consolidated Mines, Ltd., to use a desk at the offices of the Corporation, 14 Wall Street, New York City, from the middle of September, 1943, to the middle of January, 1944. During said period, Mr. Parkinson made only occasional visits to said offices. No charge was made by the Corporation therefor. No other representative of De Beers has ever made any use of the offices of the Corporation.

HENRY E. DODGE

Sworn to before me this
16th day of March, 1945.

WALTER P. SCHMID
Notary Public

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *Plaintiff,* *against* DE BEERS CONSOLIDATED MINES, LTD., *et al.*, *Defendants.*	Civil No. 29-446

AFFIDAVIT OF L. D. SIMPSON

STATE OF NEW YORK, COUNTY OF NEW YORK, } ss.:

L. D. SIMPSON, being duly sworn, deposes and says:

I am an attorney associated with the law firm of Cravath, Swaine & Moore, 15 Broad Street, New York, N. Y., which firm has been retained to advise the defendants, De Beers Consolidated Mines, Ltd., Diamond Corporation, Ltd., and Diamond Trading Company, Ltd.

I am familiar with the proceedings heretofore had herein and make this affidavit in answer in part to an affidavit of Edward S. Stimson, Special Assistant to the Attorney General, verified March 9, 1945. The statements herein are based upon information received in cables from Ernest Oppenheimer and De Beers in South Africa and conversations with persons having personal knowledge of some but not all of the facts stated herein and examination of documents in their possession.

De Beers

De Beers participated in the jewelers' exhibit, known as the House of Jewels, at the New York World's Fair in 1939 and 1940. Specifically and only for the purpose of participating in this exhibit, De Beers had some of its rough uncut

diamonds (1,000 carats or less) cut and polished into gems in South Africa and sent them to the United States to be placed in the exhibit. These diamonds were exhibited at the Fair and when the Fair closed in New York they were placed in a safe deposit box in New York City. They were subsequently sold in 1941 to Baumgold Brothers, 62 West 47th Street, New York City. These are the only diamonds belonging to De Beers which have ever been sold in the United States.

Diamond Corporation

Diamond Corporation also participated in the House of Jewels exhibit at the New York World's Fair in 1939 and 1940. Diamond Corporation sent to the United States approximately 61,893 carats of rough uncut diamonds for the sole purpose of having them exhibited at the Fair. They were then and there so exhibited. Of these diamonds approximately 27,841 carats were boart. These diamonds were not, as stated in the Stimson affidavit, displayed for the purpose of obtaining customers for such diamonds but for exhibition purposes only at the Fair. After the close of the Fair they were kept in safe deposit boxes. In addition to the diamonds exhibited at the Fair, Diamond Corporation sent to the United States approximately 105,540 carats of rough uncut diamonds in June, 1940, in connection with the contemplated organization of a corporation in New York to do business in such diamonds in the United States. The corporation, however, was not organized because it was decided not to do business in the United States. With respect to these diamonds, totaling in all approximately 167,433 carats, approximately 137,831 carats were sent to Bermuda in 1941 and 1,761 carats to London in January, 1944. The balance, approximately 27,841 carats of boart, was sold to the Procurement Division of the United States Treasury Department at its request. No other diamonds of Diamond Corporation have been sent to or sold in the United States.

Diamond Trading

In 1940, at the request of the Procurement Division of the United States Treasury Department, Diamond Trading sent to the United States a sample parcel containing approximately 78,405 carats of industrial diamonds for inspection thereof by said Division. Representatives of the Treasury Department examined the sample and placed an order with Diamond Trading for certain amounts and qualities of such diamonds. As a result of that order of th. Treasury Department, Diamond Trading invoiced to the Treasury Department 46,550 carats of industrial diamonds and 600,000 carats of boart. After these diamonds and boart were received in this country they were compared with the sample package by Treasury representatives and accepted. The Treasury Department also purchased the sample package of diamonds. These purchases took place in 1941.

At the solicitation of representatives of the United States Government, Diamond Trading sold to Metals Reserve Company (a corporation created by the Reconstruction Finance Corporation and an agency of the United States Government) 4,500,000 carats of boart in September, 1942.

At the solicitation of representatives of the United States Government, Diamond Trading sold to U. S. Commercial Company (a corporation created by the Reconstruction Finance Corporation, and the functions of which have subsequently been transferred to the Office of Economic Warfare, and which was an agency of the United States Government) 10,000 carats of industrial diamonds in accordance with a contract dated January 27, 1944.

Pursuant to arrangements made in May, 1944, with Diamond Trading by the United States Embassy in London acting on behalf of the United States Government, it was agreed that 6,000 carats of industrial diamonds which were required for special purposes; namely, indentors and die stones, be sent to the United States to permit examination thereof by experts in this country to decide whether such stones were

suitable in size and quality for the special purposes in view. This was done and the selection made. The diamonds not required were returned to London in conformity with the arrangements.

All of the diamonds purchased from Diamond Trading were sent to the United States for inspection at the request of representatives of the United States Government.

Summary

The only diamonds of De Beers sold in the United States were its diamonds exhibited by it at the New York World's Fair and sold in 1941. The only diamonds sold by any of the other said defendants in the United States were sold to the Government of the United States or agencies thereof at the solicitation and request of said Government or its agencies.

L. D. SIMPSON

Sworn to before me this
23rd day of March, 1945.

WILLIAM J. BRENNAN
Notary Public.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *Plaintiff,* *against* DE BEERS CONSOLIDATED MINES, LTD., *et al.*, *Defendants.*	Civil No. 29-446

AFFIDAVIT OF WM. DWIGHT WHITNEY

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

WM. DWIGHT WHITNEY, being duly sworn, deposes and says:

1. I am a member of the law firm of Cravath, Swaine & Moore, 15 Broad Street, New York, N. Y., which has been retained to advise the defendants De Beers Consolidated Mines, Ltd. (hereinafter called De Beers), Diamond Corporation, Ltd. (hereinafter called Diamond Corporation), and Diamond Trading Company, Ltd. (hereinafter called Diamond Trading).

2. It has been impossible to obtain affidavits from any of said three defendants. I am informed and believe that they have no officers or agents within the United States. Since the institution of this suit we have frequently written and cabled to said defendants. We have received no letters in reply but have received cables which indicated that the shortest period within which a letter written by us and posted by air-mail was received was 28 days.

3. Nothing herein contained admits on behalf of any of said defendants, by silence or otherwise, any of the allega-

tions of the complaint which are expressed in terms of characterization or as conclusions of law, or any other allegation of the complaint. The statements herein contained are exclusively statements of fact, upon information and belief, relating to the particular subject-matter thereof, and not to be extended by implication, inference or construction to constitute an admission as to any other subject-matter.

4. The statement hereinafter made are based exclusively upon information received in cables from Sir Ernest Oppenheimer and De Beers in South Africa, and are believed to be true.

5. Neither N. W. Ayer & Son, Inc. (hereinafter called Ayer), New York Agency of Banque Diamantaire Anversoise S. A., Sidney H. Ball, nor Rogers, Mayer & Ball (upon each of whom service of the summons and complaint in the above-entitled suit has been made as an alleged agent of each of said three defendants) is an agent of any of said three defendants.

6. None of said three defendants has ever carried on business in the United States.

7. Lute J. Parkinson is not now employed by De Beers and never was an agent of De Beers.

8. De Beers has no representatives in the United States.

9. De Beers and its subsidiaries have not shut down all their mines. De Beers has not acquired pipe mines with the intent or for the purpose of closing them down so as to keep their production off the market. It has in fact acquired pipe mines, but with the intent and for the purpose of working them.

10. In South Africa the consent of the government is required before mining operations at any pipe mine may be

suspended, and such consent is given only when operation of the mine becomes unprofitable. The government may compel the owners to resume production when economic conditions so warrant.

11. As to production in recent years, the facts are that De Beers conducted mining operations until September 1940 when operations were suspended on account of the war and sections of the Company's property were taken over for war work. Operations were suspended during 1941 and 1942, but it was permitted to resume mining operations in 1943, surmounting considerable difficulties in so doing owing to shortage of workers, machinery and materials. Mining operations are still in progress.

12. De Beers is now working with Bultfontein and Dutoitspand mines, the Kleinzee deposit and Consolidated Diamonds, and despite its inability to procure machinery and transport vehicles, they are being worked to the fullest extent that present conditions will permit. The Premiere and New Jagersfontein mines have not been operating because their plants have been unavailable because of war conditions.

13. In South Africa the producers must sell in conformity with current legislation of the Union of South Africa which provides for sales through one channel, either through the Diamond Producers Association (a voluntary body) or through the Government Control Board. Quotes are governed by the capacity to produce and have nothing to do with the market's capacity to absorb or consume, on which quotas have no effect whatever. Demand governs supply, and quotas are merely for the purpose of a proportionate allocation of the demand amongst the various producers. The producers frequently produce considerably more than their quota which excess is stocked until the market can absorb such surplus, and incidentally such surprise also provides

additional industrial diamonds. Quotas in gem diamonds do not limit or restrict the production of industrial diamonds or boart.

14. Diamond Trading conducts "sights" in Kimberley, Cape of Good Hope, Union of South Africa, as well as in London. In normal times it conducts "sights" as frequently as once every two weeks. The intervals are determined by the time which it takes for diamonds purchased to be cut and polished before another purchase can be made. Due to war conditions and temporary lack of facilities and shortage of staff, "sights" are now temporarily held at irregular intervals.

15. At no time has the quantity of diamonds imported into the United States been limited or restricted. The producers reward Diamond Trading at a progressively higher rate as sales increase. The direct incentive is for Diamond Trading to sell the maximum amount.

16. There is no restrictive exclusion of, or selection among, customers. The only requirement as to customers is that they be of satisfactory integrity and probity and be of sufficient financial standing to enter into reasonable commitments, as none of said defendants carry on business as retailers. There is no fixed minimum of £20,000. Sales of £5,000 or £10,000 are frequently made.

17. The marketing of cumulative stocks even during the depression was not made in a manner calculated to maintain high prices. The facts were that diamonds were impossible of sale during the period 1930 to 1933, and in common with other commodities, diamond prices dropped severely.

18. None of said three defendants makes any attempt whatever to fix, stabilize or enhance the price at which diamonds are sold in the United States. Dealers and cutters in the United States are at liberty to sell their goods to the

best advantage and are not subject to any influence by any of said three defendants.

19. The quality of industrial diamonds has been maintained. The only modifications have been made at the request of the War Production Board and have resulted in improvement of quality. Since 1943 composition of industrial series have been telegraphed to the War Production Board before allocation of sales by that Board.

20. The prices of industrial diamonds have not been increased; in fact, pre-war prices have been maintained and in some instances—for example, crushing boart, for which there has been phenomenal demand—prices have been reduced from the pre-war level of 4 shillings per carat to 2 shillings, 6 pence. Material superior to crushing boart has been included in the crushing boart mixture to meet the demand in the United States. The price of mixed industrials smalls has been reduced from 7 shillings, 3 pence to 6 shillings, 9 pence. Numerous qualities which previously sold as gem diamonds have been degraded to the industrial category and have been priced at industrial prices, which has involved a considerable financial loss to the producers.

21. The requirements of all Allied powers have been met, in particular those of the United States, which have received priority. The requirements of consumers have been and are being met under the supervision and control of the War Production Board, and a reserve stock pile of 11 to 12 million carats has been established in Canada to which the United States Government has access along with other Allied powers. Furthermore, in 1942, the defendants were prepared to sell in London 8,350,000 carats of boart and 3,000,000 carats of better industrial diamonds to the War Production Board, but at the request of the British Government authorities and with the concurrence of the War Production Board the establishment of the Canadian reserve was substituted therefor and 11,500,000 carats were transferred to

the Western Hemisphere. These diamonds are available to the War Production Board as required. A copy of the agreement among the Governments of the United States, Canada and the United Kingdom of Great Britain and Northern Ireland, entered into March 26, 1943, is annexed hereto as Schedule A.

WM. DWIGHT WHITNEY

Sworn to before me this
24th day of March, 1945.

WILLIAM J. BRENNAN
Notary Public, Queens County
Queens Co. Clk's No. 3597, Reg. No. 368-B-6
Kings Co. Clk's No. 308, Reg. 487-B-6
N. Y. Co. Clk's No. 1242, Reg. No. 775-B-6
Commission Expires March 30, 1946

[NOTARIAL SEAL]

SCHEDULE A

The Government of the United States of America, the Government of Canada and the Government of the United Kingdom of Great Britain and Northern Ireland considering that it is desirable, as a precaution against the adverse fortunes of war, to create a reserve of industrial diamonds upon the North American Continent, for possible needs of the United Nations, have agreed as follows:—

ARTICLE 1.

Statement of Principle.

The contracting Governments intend that the normal consumption requirements of the various nations shall be met currently from mine production and from stocks in the United Kingdom and various producing countries, and that the reserve hereinafter provided for shall not be drawn upon except under the conditions stated in this agreement.

ARTICLE 2.

Size of Reserve

The reserve shall contain a minimum quantity of 11,500,000 carats of diamonds suitable for the uses specified in Appendix I and containing so far as possible the quantities in the various sizes specified under those uses.

ARTICLE 3.

Composition of Reserve.

The Government of the United Kingdom will take such steps as are practicable for the reserve to be established by the transfer to Canada of stocks of diamonds held by diamond producing companies and by the Diamond Corporation in the quantities and of the descriptions set forth in Appendix II. Appendix II also sets forth the quantities of dia-

monds of the various use classifications and sizes which it is estimated will be found in the total quantities to be transferred by each company.

ARTICLE 4.

Transfer of Reserve.

Transfer of the reserve shall begin as soon as possible after the date of signature of this agreement. The Government of the United Kingdom will use its best efforts to ensure transfer at a rate of 600,000 carats per week, but single shipments shall not exceed 300,000 carats each. The quantities so transferred shall be kept in safe keeping in such places in Canada as may be approved by the respective Governments. In the event that the Government of the United Kingdom desires to maintain a portion of the reserve in the United States, the Government of the United States will provide the necessary safe depositories.

ARTICLE 5.

Maintenance of Production and Supply.

The Government of the United Kingdom and the Government of the United States agree to take all practicable steps to maintain production at, or, if necessary, to increase it to levels adequate to provide both for the full current requirements of the United Nations, and for the maintenance of the present stocks in the United States and the United Nations reserve. The Government of the United States will use its best efforts to maintain an adequate supply of industrial diamonds to Canada to meet the current requirements of Canadian industries and to maintain existing stocks. Estimates of the current annual requirements of the United Nations made as of the 30th June, 1942, are set forth in Appendix III. It is understood, however, that such actual requirements may vary from these estimates from time to time.

ARTICLE 6.

Conditions of Withdrawal.

A. *Withdrawal by the United States.*

The Government of the United States shall be entitled to draw upon the reserve stock, in any classification when the United States Stock of that Classification falls to a quantity less than 90 per cent. of the normal stock as of the 30th June, 1942. The normal stocks as of the 30th June, 1942, are set forth by classifications in Appendix IV and are the stocks in private and Government hands in the United States including 4,505,000 carats of boart purchased but not delivered as of that date. Upon notice furnished to the Government of the United Kingdom by the Government of the United States that the stock of any classification has fallen below 90 per cent. of such normal stock, the Government of the United Kingdom undertakes to take all reasonable steps to make shipments to restore such stock to the figures set forth in Appendix IV for such classification within 60 days. If, at the end of such 60-day period, the shipments have not been made, the Government of the United States shall be entitled to draw upon the United Nations reserve in quantities sufficient to restore the stock of such classification to the figures set forth in Appendix IV for such classification. The Government of the United States may effect such withdrawals through the Metals Reserve Company or any other Government agency or department or through merchants or other private parties nominated by it.

B. *Withdrawal by the United Kingdom.*

The Government of the United Kingdom may draw upon the United Nations reserve when, in its opinion, it becomes impracticable to meet current requirements from stocks in the United Kingdom or from African stocks or production. The Government of the United Kingdom shall, under such circumstances, formally assure the Government of the United States of the reasons and need for such withdrawal.

C. *Withdrawal for Canadian Requirements.*

If the stocks in Canada of industrial diamonds of any of the descriptions mentioned in Appendix IV fall at any time below the quantity of that description consumed in Canada during the preceding six months the Government of Canada may notify the Government of the United Kingdom and the Government of the United States that a shortage of industrial diamonds of that description exists. If the shortage of that description is not met either by delivery from the United States or from the United Kingdom within 90 days of the date of notification then the Government of the United Kingdom shall withdraw from the reserve for requirements in Canada such quantities of diamonds as are required to remove the shortage.

D. *Withdrawals for other United Nations Requirements.*

Withdrawals for the requirements of other United Nations may be made after consultation between appropriate representatives of the Government of the United States and the Government of the United Kingdom.

E. *Combined Raw Materials Board.*

The provisions of this Article are subject to any action which may be required as the result of decisions by the Combined Raw Materials Board.

ARTICLE 7.

Prices of Material Withdrawn and Expenses of Transfer.

Industrial diamonds withdrawn from the United Nations reserve shall be withdrawn at United States dollar prices for comparable material (converted from Sterling at the official rate at the date of such withdrawal) ruling on the 30th June, 1942, to which prices may be added reasonable amounts to cover the proportion of the cost of the establishment, maintenance and liquidation of the United Nations reserve at

tributable to the diamonds withdrawn. Provided that if the ceiling prices of industrial diamonds in the United States are raised, the prices ruling on the 30th June, 1942 and chargeable hereunder may be raised by the same percentage as the percentage increase or increases in such ceiling prices. Since it is probable that the United Nations reserve will include certain quantities of cuttable material not normally employed for industrial purposes but suitable therefor, the Government of the United Kingdom will, in the event of an emergency requiring the use of such cuttable material, employ its best efforts to furnish this material to the United Nations at reasonable prices reflecting the utility of the material and its cost of production for industrial purposes and not its value as gem stones.

All expenses of the transfer of diamonds to North America for the United Nations reserve and of the maintenance, sorting and liquidation of the reserve including indemnity for any loss or damage to the diamonds shall be advanced in equal proportion by the Government of the United States and the Government of the United Kingdom subject to reimbursement from any sales from the reserve to the extent that the prices of sales from the reserve include, directly or indirectly, amounts which the Governments have advanced in respect of the establishment, maintenance and liquidation of the reserve. The Government of the United States undertakes to advance in the first instance any disbursements incurred in United States or Canadian dollars. On the liquidation of the reserve such part of the above-mentioned expenses as has not been reimbursed from sales from the reserve shall be shared equally by the two Governments. The Ministry of Supply of the United Kingdom will keep running accounts of advances and reimbursements.

ARTICLE 8.

Sorting Material.

The Government of the United Kingdom will make adequate arrangements with the producing companies and with

the Diamond Corporation to ensure that the United Nations reserve is sorted into the usual assortments of the Diamond Corporation upon its transfer to Canada and that such other necessary arrangements are made that withdrawals in accordance with the provisions of Article 6 can be made without any delay.

ARTICLE 9.

Agreement with Producers.

The Government of the United States and the Government of Canada take note of the draft agreement between the Minister of Supply of the United Kingdom and certain diamond producers, the Diamond Corporation, Ltd. and the Diamond Trading Company, Ltd., which is reproduced as Appendix V and will, so far as may be necessary, afford facilities for the performance of the terms of such an agreement.

ARTICLE 10.

Exchange of Information.

A. *Information furnished by the Government of the United States.*

The Government of the United States undertakes to furnish to the Government of the United Kingdom within 90 days after the end of each quarterly period commencing with that ending on the 31st December, 1942, a statement by classifications, of the stocks of industrial diamonds in the United States and of estimated purchases in South America until the end of 1946.

B. *Information furnished by the Government of the United Kingdom.*

The Government of the United Kingdom undertakes to furnish to the Government of the United States, within 90 days after the end of each quarterly period commencing with

that ending on the 31st December, 1942, a statement by classifications of the stocks of industrial diamonds included in the United Nations reserve. Such statements shall include a summary of the results and progress of sorting in Canada. The Government of the United Kingdom further agrees to furnish quarterly statements to the Government of the United States of stocks in the United Kingdom (separately for merchants, the Diamond Corporation and its affiliates, and producers) and, so far as possible, of stocks in the hands of producers in Africa.

Miscellaneous Provisions.

ARTICLE 11.

Nothing in this agreement shall be construed to prevent any of the United Nations from acquiring additional quantities of industrial diamonds through purchase for its national reserve if diamonds are available and can be supplied without interfering with supplies for normal consumption and for the implementing of this agreement.

ARTICLE 12.

The three contracting Governments agree to take such steps as are reasonable and practicable to ensure that all diamonds acquired by any person as industrial diamonds are sold by the most direct channels for use in industry and that they are not bought or sold speculatively or for hoarding.

ARTICLE 13.

The Government of the United States and the Government of the United Kingdom will each appoint a representative to meet and adjust any difficulties of interpretation of this agreement which may arise from time to time. In any question affecting Canadian interests the Government of Canada may appoint a representative to collaborate with the representatives of the other two Governments.

ARTICLE 14.

Duration of Agreement.

This agreement shall operate from the date of signature and, except by mutual consent, it shall terminate nine months after the cessation of hostilities. For the purpose of this clause the cessation of hostilities shall be the date on which there is a general suspension of hostilities between the United Kingdom and the United States (or the later of them to suspend hostilities) on the one hand and the last of the enemy Powers with whom they are now at war on the other hand.

Done in triplicate in London, the 26th day of March, 1943.

On behalf of the Government of the United States of America:

H. FREEMAN MATTHEWS.

On behalf of the Government of Canada:

VINCENT MASSEY.

On behalf of the Government of the United Kingdom of Great Britain and Northern Ireland:

ALEXANDER CADOGAN.

APPENDIX 1.

Quantities and Sizes of Industrial Diamonds for various uses which should, so far as possible, be contained in the United Nations' Reserve (Article 2).

	Carats.
I.—Drilling material—	
14 per carat and under	1,790,000
II.—Material for drilling and dressing grinding wheels—	
14 per carat to ⅓ carat	431,000
III.—Material for dressing grinding wheels—	
(a) ⅓ to 1 carat	255,000
(b) 1 to 2 carats	420,000
(c) 2 to 6 carats	227,000
(d) 6 carats and over	40,000
IV.—Material for shaped tools—	
(a) ⅓ to 1 carat	—
(b) 1 carat and over	20,000
V.—Material for wire drawing dies—	
(a) ⅛ to ⅓ carat	—
(b) ⅓ to 1 carat	—
(c) Over 1 carat	1,000
VI.—Carbons	—
VII.—Crushing boart	8,350,000
Total	11,534,000

APPENDIX II.

Quantities of Diamonds to be transferred to the United Nations Reserve by Producing Companies and the Diamond Corporation, together with an estimate of quantities of various sizes suitable for the undermentioned uses included therein (Article 3).

A.

Quantities to be transferred—

	Carats.	
1. Companhia de Diamantes de Angola	700,000	run of mine.
2. Consolidated African Selection Trust, Ltd.	82,000	serie goods.
	430,000	original boart.
	72,000	sand.
	150,000	run of mine (less dust).
	66,000	Ball-Mill product.
	800,000	carats.
3. Sierra Leone Selection Trust, Ltd.	105,000	serie goods.
	1,025,000	original boart.
	358,000	run of mine.
	12,000	sand.
	1,500,000	carats.
4. Société Internationale Forestière et Minière du Congo...	2,000,000	pre-classe.
	5,000,000	original crushing boart.
	7,000,000	carats.
	184,378	United Kingdom reserve.

5. Diamond Corporation, Ltd. (Incorporated in the Union of South Africa)	3,000,000 35,000	boart. selected stones.
	3,219,378	carats.

B.

Estimated Composition of Material to be transferred.

	Carats.
I.—Drilling material 14 per carat and under..	495,500
II.—Material for drilling and for dressing grinding wheels 14 per carat to ⅓ carat (including material for wire drawing ⅛ to ⅓ carat)	618,000
III.—Material for dressing grinding wheels, for shaped tools and for wire drawing dies—	
⅓ to 1 carat.....	588,500
1 to 2 carats.....	564,378
2 to 6 carats.....	191,000
6 carats and over.....	37,000
IV.—Crushing and better boart.....	10,179,500
V.—Cuttable—not useful industrially.....	545,500
Total	13,219,378

APPENDIX III.

Estimate made at 30th June, 1942, of the Supplies of Industrial Diamonds required annually to meet the current needs of the United Nations (Article 5).

	United States and Canada. Carats.	United Kingdom, U.S.S.R. and other countries. Carats.	Total Carats.
I.—Drilling material—			
14 per carat and under	600,000	125,000	725,000
II.—Material for drilling and dressing grinding wheels—			
14 per carat to ⅓ carat	250,000	150,000	400,000
III.—Material for dressing grinding wheels—			
(a) ⅓ to 1 carat	150,000	70,000	220,000
(b) 1 to 2 carats	150,000	80,000	230,000
(c) 2 to 6 carats	80,000	60,000	140,000
(d) 6 carats and over	20,000	—	20,000
IV.—Material for shaped tools—			
(a) ⅓ to 1 carat	20,000	35,000.	55,000
(b) 1 carat and over	8,000	17,000	25,000
V.—Material for wire drawing dies—			
(a) ⅛ to ⅓ carat) (b) ⅓ to 1 carat)	35,000	16,000	51,000
(c) Over 1 carat	8,000	7,500	15,500
VI.—Carbons	—	—	—
VII.—Crushing boart	4,300,000	1,000,000	5,300,000
Total	5,621,000	1,560,500	7,181,500

APPENDIX IV.

United States' normal stock of Industrial Diamonds as at 30th June 1942 (Article 61).

	Carats
I.—Drilling material —	
14 per carat and under	1,185,000
II.—Material for drilling and dressing grinding wheels—	
14 per carat to ⅓ carat	663,000
III.—Material for dressing grinding wheels—	
(a) ⅓ to 1 carat	406,000
(b) 1 to 2 carats	307,000
(c) 2 to 6 carats	150,000
(d) 6 carats and over	55,000
IV.—Material for shaped tools—	
(a) ⅓ to 1 carat	79,000
(b) 1 carat and over	20,000
V.—Material for wire drawing dies—	
(a) ⅛ to ⅓ carat	76,000
(b) ⅓ to 1 carat	65,000
(c) Over 1 carat	19,000
VI.—Carbons	59,000
VII.—Crushing boart and powder	13,116,000
Total	16,200,000

APPENDIX V.

Draft Agreement between the Minister of Supply and Diamond Producing Companies, the Diamond Corporation and the Diamond Trading Company, Limited, regarding a United Nations Reserve of Industrial Diamonds.

This Agreement is made the day of , 1943, between Companhia de Diamontes de Angola, a company incorporated in whose principal office is situate at Consolidated African Selection Trust, Limited, whose registered office is situate at Sierra Leone Selection Trust, Limited, whose registered office is situate at and Société Internationale Forestière et Minière du Congo, a company incorporated in , whose principal office is situate at (hereinafter together called "the Companies") of the first part, the Diamond Corporation, Limited, a company incorporated in the Union of South Africa, whose principal office is situate at (hereinafter called "the Corporation") of the second part, the Diamond Trading Company, Limited, a company incorporated in the Union of South Africa, whose principal office is situate at (hereinafter called "the Trading Company") of the third part, and the Minister of Supply (hereinafter called "the Minister") of the fourth part.

Whereas it has been agreed between the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of Canada, and the Government of the United States of America that it is desirable as a precaution against the adverse fortunes of war to create a reserve of industrial diamonds (hereinafter referred to as "the Reserve") in Canada for possible needs of the nations now associated with them in war

And whereas the Companies, the Corporation and the Trading Company have agreed to collaborate with the Minister in the establishment of the Reserve in manner hereinafter appearing

Now it is hereby agreed as follows:—

ARTICLE I.

Each of the Companies and the Corporation will transfer to addresses in Canada approved by the Minister the quantities and descriptions of diamonds stated against its name in Schedule I of this Agreement. The aggregate of such diamonds when so transferred shal constitute the Reserve.

ARTICLE 2.

The diamonds in the Reserve will remain the property of one of the Companies or the Corporation or the Trading Company as the case may be and shall be sold to any person who is not a party to this Agreement only at the request of the Minister and by or through the Trading Company and in according with any contracts between the Companies and any of them and the Corporation which may for the time being be operative.

ARTICLE 3.

No part of the Reserve shall be removed from the approved addresses in Canada except with the consent of the Minister or except at the request of the Minister to meet an emergency requirement for industrial diamonds notified to the Corporation by the Minister. On receipt of such notification, the Corporation will arrange for the sale from the Reserve of such classes and quantities of diamonds to the Government of or merchants in the country where the emergency requirement has arisen as may be specified in the notification. The notification will specify the quantities of diamonds to be sold in the normal selling classifications of the Trading Company and each of the Companies will sell to the Corporation, according to the normal contracts existing between it and the Corporation, such quantities and classes of diamonds as the Corporation may call upon it to provide as being necessary to meet the emergency requirement.

ARTICLE 4.

(1) It is the intention of the parties hereto that the Companies, the Corporation and the Trading Company shall be relieved of all payments in connexion with the diamonds provided for the Reserve other than payments which the Companies, the Corporation or the Trading Company would have made if the diamonds had not been provided for the Reserve and with a view thereto the following provisions shall apply:—

(2) The Minister shall—

(a) discharge all expenses of the transfer of diamonds to North America for the Reserves and of the maintenance, sorting and liquidation of the Reserve;

(b) discharge all other proper payments, including all (if any) taxes, duties, assessments or charges, whether on export, sales, income or otherwise, which would not have been incurred or levied if the diamonds had not been removed to North America for the purposes of the Reserve.

(3) Each of the Companies shall refund to the Minister from the proceeds of the sale by it of any diamonds comprised in the Reserve such expenses or payments discharged by the Minister in respect of those diamonds as the Company would have discharged if those diamonds had been sold in London to the Diamond Corporation on the 30th June, 1942.

(4) The Diamond Corporation shall refund to the Minister from the proceeds of the sale by it of any diamonds comprised in the Reserve such expenses or payments discharged by the Minister in respect of those diamonds as the Corporation would have discharged if those diamonds had been sold by it on the 30th June, 1942.

(5) The Trading Company shall refund to the Minister from the proceeds of the sale by it of any diamonds comprised in the Reserve such expenses or payments discharged by the Minister in respect of those diamonds as the Trading Company would have discharged if those diamonds had been sold by it in London on the 30th June, 1942. In addition, the Trading Company shall refund to the Minister from the sales of diamonds comprised in the Reserve the proceeds of such additions (if any) to the selling prices of the 30th June, 1942, as are made to the selling prices of those diamonds under Article 7 of this Agreement to meet the additional costs of the Minister.

(6) If on the termination of this Agreement there remain unsold any diamonds which were included in the Reserve the Minister will be entitled to the refund out of the proceeds of the sale of those diamonds by the Company owning them, the Corporation and the Trading Company of only such expenses or payments discharged by him in respect of those diamonds as the Company, the Corporation and the Trading Company respectively would have discharged if the diamonds had not formed part of the Reserve. The Minister will, however, be prepared to consider with the other parties hereto when the time arises whether this obligation should be discharged by part payment of the estimated amount due from those other parties or otherwise.

ARTICLE 5.

The transfer of diamonds to Canada under this Agreement shall begin as soon as possible after the date of signature of this Agreement and the Companies and the Corporation severally undertake to use their best efforts to transfer the diamonds mentioned in Schdule I opposite their respective names at a rate not less than the rate set forth and from the date set forth in Schedule II for each Company. Single shipments shall not exceed 300,000 carats each.

ARTICLE 6.

The Companies and the Corporation will arrange for the sorting of the diamonds in the Reserve in such manner as will enable the quantities of industrial diamonds suitable for the various industrial uses to which they are put to be estimated readily and in such manner as they will be readily available for sale in the usual selling classifications of the Trading Company. A report on the quantities of diamonds of various classes in the Reserve and of the progress of the sorting will be furnished to the Minister by each of the Companies, the Corporation and the Trading Company or by the Corporation on their behalf for each quarter commencing with that ending on the 31st March, 1943, and at the end of each three months thereafter.

ARTICLE 7.

The prices at which the diamonds will be sold from the Reserve will be the Trading Company's selling prices in operation on the 30th June, 1942, with the addition of such amounts as are estimated by the Minister to be reasonable to cover the additional costs of the Minister, the Companies, the Corporation and the Trading Company for the establishment, maintenance and liquidation of the Reserve (including the costs of returning diamonds to the United Kingdom and insurance mentioned in Articles 9 and 10), provided that if the ceiling prices of industrial diamonds in the United States are raised the Trading Company's selling prices for diamonds in the Reserve may be increased correspondingly with the consent of the Minister. If rough diamonds of cuttable quality not normally sold as industrial diamonds are sold out of the Reserve as industrial diamonds, the prices to be charged by the Trading Company will be such reasonable prices as reflect the utility of the material and its cost of production for industrial purposes and not its value as gem stones. Such diamonds shall be sold at those prices subject

to an undertaking that they will be re-sold only for use in industry and notification of such sales will be made to the Minister.

ARTICLE 8.

The Companies, the Corporation and the Trading Company severally agree to furnish to the Minister within 30 days after the end of each quarterly period commencing with that ending on the 31st March, 1943, a statement of the stocks of industrial diamonds which they hold, with such information as to the quantities of the various classes mentioned in Schedule I contained in the stocks as will enable an estimate to be made of the quantities which are suitable for various industrial uses.

ARTICLE 9.

The Minister will make provision at his own expense for the return to the United Kingdom of the diamonds remaining in the Reserve at the termination of this Agreement.

ARTICLE 10.

The Minister will pay the costs of insuring at the current selling prices of the owners the diamonds provided for the Reserve against all insurable risks of damage or loss from the date when the diamonds are despatched from storage *en route* to Canada until they are sold or returned to the United Kingdom in accordance with the provisions of Article 9 or otherwise cease to be covered by this Agreement, whichever first happens. These costs shall be regarded as expenses for the purpose of refunds to the Minister under Article 4 of this Agreement.

ARTICLE 11.

This Agreement shall operate from the date of signature and, unless in view of the passing of the emergency it is terminated earlier by mutual consent, shall terminate nine months after the cessation of hostilities, except as regards the reimbursement of expenses referred to in Article 4 hereof. For the purpose of this clause the cessation of hostilities shall be the date on which there is a general suspension of hostilities between the United Kingdom and the United States of America (or the later of them to suspend hostilities) on the one hand and the last of the enemy Powers with whom they are now at war on the other hand.

ARTICLE 12.

This Agreement shall be construed according to the law of England.

SCHEDULE I.

Quantities of Diamonds to be transferred to the United Nations Reserve by Producing Companies and the Diamond Corporation.

1. Companhia de Diamantes de Angola	700,000 carats run of mine.
2. Consolidated African Selection Trust, Ltd.	82,000 carats serie goods. 430,000 carats original boart. 72,000 carats sand. 150,000 carats run of mine (less dust). 66,000 carats Ball-Mill product. 800,000 carats.
3. Sierra Leone Selection Trust, Ltd.	105,000 carats serie goods. 1,025,000 carats original boart. 358,000 carats run of mine. 12,000 carats sand. 1,500,000 carats.
4. Société Internationale Forestière et Minière du Congo	2,000,000 carats pre classe. 5,000,000 carats original crushing boart. 7,000,000 carats.
5. Diamond Corporation, Ltd. (Incorporated in the Union of South Africa)	184,378 carats United Kingdom reserve. 3,000,000 carats boart. 35,000 carats selected stones. 3,219,378 carats.

SCHEDULE II.

Rate of Transfer of Diamonds to Canada for the United Nations Reserve.

Companhia de Diamantes de Angola	35,000 carats run of mine goods each week from the week commencing , 1943.
Consolidated African Selection Trust, Ltd.	40,000 carats each week from the week commencing , 1943, spread as most convenient over the various classes of goods to be transfered.
Sierra Leone Selection Trust, Ltd.	70,000 carats each week from the week commencing , 1943, spread as most convenient over the various classes of goods to be transfered.
Société Internationale Forestière et Minière du Congo	320,000 carats each week from as soon after the , 1943, as is possible; preference being given to the shipment of pre classe goods.
Diamond Corporation, Ltd.	184,378 carats United Kingdom reserve during the two weeks commencing , 1943; and 145,000 carats of boart each week from the week commencing , 1943, 35,000 carats selected stones as early as possible.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,

v.

DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD., DIAMOND TRADING COMPANY, LTD., SOCIETE GENERALE DE BELGIQUE, SOCIETE MINIERE DU BECEKA, SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO, COMPANHIA DE DIAMANTES DE ANGOLA, CONSOLIDATED AFRICAN SELECTION TRUST, LTD., SIERRA LEONE SELECTION TRUST, LTD., RUSSELL JOHNSON PARKER, LUTE J. PARKINSON, HERBERT H. VREELAND, ALBERT E. THIELE, SOLOMON R. GUGGENHEIM, CLENDENIN J. RYAN, AND GEORGE K. STURM,
Defendants.

Civil No. 20-446

NOTICE OF MOTION FOR LEAVE TO TAKE DEPOSITIONS

To CRAVATH, SWAINE and MOORE attorneys for
De Beers Consolidated Mines, Ltd.
Diamond Corporation, Ltd.
Diamond Trading Company

HOOKER, ALLEN and DUNCAN attorneys for
Societe Generale de Belgique

ROOT, CLARK, BUCKNER and BALLENTINE attorneys for
Societe Miniere du Beceka
Societe Internationale Forestiere et Miniere du Congo
Companhia de Diamantes de Angola
George K. Sturm

DAVIS, POLK, WARDWELL, SUNDERLAND and KIENDL
attorneys for
Consolidated African Selection Trust, Ltd.
Sierre Leone Selection Trust, Ltd.

CHADBOURNE, WALLACE, PARK and WHITESIDE attorneys for
Russell Johnson Parker

Please take notice that the undersigned will bring the within motion on for hearing before this Court at Room 506, United States Court House, Foley Square, New York, N. Y., on the 30th day of March, 1945 at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

s/ EDWARD S. STIMSON
EDWARD S. STIMSON
Special Assistant to the Attorney General
Counsel for the Plaintiff

Room 2303—United States Court House
Foley Square, New York 7, N. Y.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,

v.

DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD., DIAMOND TRADING COMPANY, LTD., SOCIETE GENERALE DE BELGIQUE, SOCIETE MINIERE DU BECEKA, SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO, COMPANHIA DE DIAMANTES DE ANGOLA, CONSOLIDATED AFRICAN SELECTION TRUST, LTD., SIERRA LEONE SELECTION TRUST, LTD., RUSSELL JOHNSON PARKER, LUTE J. PARKINSON, HERBERT H. VREELAND, ALBERT E. THIELE, SOLOMON R. GUGGENHEIM, CLENDENIN J. RYAN, AND GEORGE K. STURM,
Defendants.

Civil No. 29-446

MOTION FOR LEAVE TO TAKE DEPOSITIONS BEFORE ANSWER

The United States of America moves the court for an order granting it leave to take the depositions of the officers and employees of the corporations having knowledge of the facts desired as set out below and of individuals, both as listed below, for the purpose of discovery or for use as evidence in this action or for both purposes on the ground that their testimony is desired for use on the motion of De Beers Consolidated Mines, Ltd., Diamond Corporation, Ltd. and Diamond Trading Company to dismiss the action for want of jurisdiction over their persons and to quash the service of summons, for use on the same issues which the other foreign corporate defendants intend to raise, all as set forth in the

supporting Affidavit of Edward S. Stimson attached hereto and filed herewith.

The United States of America moves the court that the order granting leave to take these depositions authorize it to issue subpoenas requiring the production of documentary evidence as follows: all correspondence and contracts with any of the defendants and all printed material, advertisements, inter-office memoranda, memoranda and notations bearing upon or tending to show the doing of business or any activity by the foreign corporate defendants in the United States. The individuals whom and the corporations the personnel of which the Government desires to take depositions are as follows:

Russell Johnson Parker
120 Broadway
New York, N. Y.

Albert E. Thiele
120 Broadway
New York, N. Y.

George K. Sturm
26 Beaver Street
New York, N. Y.

Sydney H. Ball
26 Beaver Street
New York, N. Y.

Rogers, Mayer & Ball
26 Beaver Street
New York, N. Y.

Newmont Mining Company
14 Wall Street
New York, N. Y.

American Metals Co., Ltd.
61 Broadway
New York, N. Y.

N. W. Ayer & Son, Inc.
30 Rockefeller Plaza
New York, N. Y.

Medley G. B. Whelpley
120 Broadway
New York, N. Y.

Banque Diamantaire Anversoise, S.A.
630 Fifth Avenue
New York, N. Y.

Chase National Bank
18 Pine Street
New York, N. Y.

Chase National Bank
11 Broad Street
New York, N. Y.

Guaranty Trust Company, of New York
140 Broadway
New York, N. Y.

Standard Bank of South Africa, Ltd.
67 Wall Street
New York, N. Y.

Pierre Cattier
10 Pearl Street
New York, N. Y.

Gilbert Perrier
10 Pearl Street
New York, N. Y.

Emile Heyrman
10 Pearl Street
New York, N. Y.

Atlantic Overseas Corporation
10 Pearl Street
New York, N. Y.

International Sales Corporation
500 Fifth Avenue
New York, N. Y.

s/ EDWARD S. STIMSON
EDWARD S. STIMSON
Special Assistant to the Attorney General
Attorney for the Plaintiff.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,

v.

DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD., DIAMOND TRADING COMPANY, LTD., SOCIETE GENERALE DE BELGIQUE, SOCIETE MINIERE DU BECEKA, SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO, COMPANHIA DE DIAMANTES DE ANGOLA, CONSOLIDATED AFRICAN SELECTION TRUST, LTD., SIERRA LEONE SELECTION TRUST, LTD., RUSSELL JOHNSON PARKER, LUTE J. PARKINSON, HERBERT H. VREELAND, ALBERT E. THIELE, SOLOMON R. GUGGENHEIM, CLENDENIN J. RYAN, AND GEORGE K. STURM,
Defendants.

Civil No. 29-446

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE LEAVE TO TAKE DEPOSITIONS

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

EDWARD S. STIMSON, being first duly sworn, deposes and says that he is a Special Assistant to the Attorney General with headquarters in Washington, D. C.; that he is one of counsel for the United States of America in the above entitled cause; that the complaint in the above entitled cause was filed on January 29, 1945; that a copy of the summons and complaint in this action was personally served on the individual defendants in the Southern District of New York as follows: Russell Johnson Parker, 31st day of January 1945, Albert E. Thiele, 31st day of January 1945; and George K. Sturm, 30th day of January 1945; that a copy of the summons and complaint was served on Solomon R. Guggenheim on the 17th day of February 1945, by delivering copies of the same to a responsible person at his residence, Trillora Court, Port Washington, New York; that a copy of the summons and complaint in this action was served on each of the for-

eign corporate defendants in the Southern District of New York between January 30 and February 1, 1945 inclusive; that none of the defendants have filed an answer and that the only pleading filed by any of the defendants is a motion to dismiss for lack of jurisdiction over the person of defendant and to quash the service of summons filed by De Beers Consolidated Mines, Ltd., Diamond Corporation Ltd., and Diamond Trading Company on the 23rd day of February 1945; that counsel for Societe Generale de Belgique has objected to government counsel interviewing persons connected with corporations and individuals served with process as agents of Societe Generale de Belgique and that Government counsel has not felt free to interview any of the persons or corporations by their officers and employees who were served with process as agents, cashiers or directors of the foreign corporate defendants; that meanwhile counsel for the defendant foreign corporations are busily engaged in interviewing these persons connected with corporations and individuals served as agents, cashiers and directors; that although an extension of one month to move, plead or answer was consented to by counsel for the Government, counsel for the foreign corporate defendants in a conference before Judge Samuel Mandelbaum on the 13th day of March 1945, urged that they needed additional time to secure affidavits on the question of doing business in the United States from abroad thus clearly indicating that all of the foreign corporate defendants intend to raise the issue of jurisdiction over their persons.

s/ EDWARD S. STIMSON
EDWARD S. STIMSON

Sworn to and subscribed before me this 21 day of March, 1945.

s/ MARY C. SEPE
Notary Public Queens Co. No. 3630
Reg. No. 477-S-5
N. Y. Co. Clk's No. 1803—Kings Co. Clk's No. 180
Commission Expires March 30, 1945

(SEAL) Notary Public

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,

v.

DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD., DIAMOND TRADING COMPANY, LTD., SOCIETE GENERALE DE BELGIQUE, SOCIETE MINIERE DU BECEKA, SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO, COMPANHIA DE DIAMANTES DE ANGOLA, CONSOLIDATED AFRICAN SELECTION TRUST, LTD., SIERRA LEONE SELECTION TRUST, LTD., RUSSELL JOHNSON PARKER, LUTE J. PARKINSON, HERBERT H. VREELAND, ALBERT E. THIELE, SOLOMON R. GUGGENHEIM, CLENDENIN J. RYAN, AND GEORGE K. STURM,
Defendants.

Civil No. 29-446

Appearances:

WENDELL BERGE, Esq.,
Assistant Attorney General;

HERBERT A. BERMAN, PATRICK A. GIBSON AND EDWARD S. STIMSON, Esqs.,
Special Assistants to the Attorney General, Attorney for plaintiff.

CRAVATH, SWAINE & MOORE, Esqs.,
Attorneys for De Beers Consolidated Mines, Ltd., Diamond Corporation, Ltd., Diamond Trading Company, Ltd.,

ROBERT T. SWAINE, BRUCE BROMLEY, WM. DWIGHT WHITNEY, JACK W. ROBBINS, Esqs., of Counsel.

ROOT, CLARK, BUCKNER & BALLANTINE, Esqs.,
Attorneys for defendants Societe Internationale Forestiere et Miniere du Congo and Companhia de Diamantes de Angola,
JOHN E. F. WOOD, Esq., of Counsel.

HOOKER, ALLEY & DUNCAN, Esqs.,
Attorneys for defendant Societe Generale de Relgique, appearing specially,
JAMES B. ALLEY, Esq., of Counsel.

OPINION

MANDELBAUM, *D. J.*:

The complaint in this action brought by the government charges the corporate defendants and certain individuals with engaging in an unlawful combination and conspiracy restraining foreign commerce in this country in industrial and gem diamonds, in violation of the Sherman Anti-Trust and the Wilson Tariff Acts. The complaint seeks injunctive relief to prevent the continuation of the illegal practices charged. It is alleged that as one of the results of the conspiracy, the United States Government has been prevented from accumulating a stockpile of industrial diamonds in this country for military purposes.

At the time of the filing of the complaint, the court signed a restraining order temporarily enjoining the corporate defendants from withdrawing their assets in banks and from otherwise disposing of property belonging to the corporate defendants in the United States.

The government is now moving for a temporary injunction to replace the restraining order pending the determination of the issues in this case.

The main question before this court is whether or not the court has the power to issue the injunction prayed for. In my opinion, this court clearly has the power to issue the injunction both under the Judicial Code and under Sec. 4 of the Sherman Act. The Judicial Code (28 U. S. C. A., Sec. 377) authorizes the United States Courts "to issue all writs not specifically provided for by statute which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law". Sec. 4 of the Sherman Act (15 U. S. C. A. 4) expressly provides that "before final decree, the court may, at any time make temporary restraining order or prohibition as shall be deemed just in the premises." So much for the power of the court to issue the injunction.

Having come to the conclusion that this court has the power, the next problem which presents itself is whether or not this court in the exercise of its discretion should issue the preliminary injunction on the facts before it on this motion.

The defendants are all foreign corporations. None of the defendants have filed answers to the complaint. I am convinced from the facts appearing in the verified complaint and the affidavits in support of and in opposition to this motion that if the injunction does not issue, the assets of the corporate defendants will in all probability be withdrawn from this country. In that event, if the government should succeed in establishing its cause, there would be no way to enforce the decree of the court.

The resulting damage to the government, if I were to deny this motion, is incomparably greater than any damage to the corporate defendants if I were to grant the motion.

Equity will take necessary steps to protect its jurisdiction where, as here, there is a great probability that the enforcement of its decrees will otherwise be frustrated.

During the course of argument, the question was raised by counsel of whether the court should deal with the problem of the defendants' doing business here, as ancillary to the question of the preliminary injunction. I am not passing upon the defendants' doing business, because in my opinion, that question is not before the court on the instant motion.

The motion is granted. Settle order on notice.

Findings of Fact

1. The facts alleged in the verified complaint are adopted by the court and incorporated herein as findings of fact for the purposes of this motion only.

Conclusions of Law

1. This court has the power to grant the preliminary injunction prayed for under Sec. 4 of the Sherman Act and Sec. 377 of Title 28 U. S. C. A.

2. This court in the exercise of its discretion grants the motion for a preliminary injunction.

Dated March 28th, 1945

SAMUEL MANDELBAUM
U. S. D. J.

U. S. District Court
Filed
March 28, 1945
S. D. of N. Y.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *Plaintiff*, v. DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD., DIAMOND TRADING COMPANY, LTD., SOCIETE GENERALE DE BELGIQUE, SOCIETE MINIERE DU BECEKA, SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO, COMPANHIA DE DIAMANTES DE ANGOLA, CONSOLIDATED AFRICAN SELECTION TRUST, LTD., SIERRA LEONE SELECTION TRUST, LTD., RUSSELL JOHNSON PARKER, LUTE J. PARKINSON, HERBERT H. VREELAND, ALBERT E. THIELE, SOLOMON R. GUGGENHEIM, CLENDENIN J. RYAN, AND GEORGE K. STURM, *Defendants*.	Civil No. 29-446

PRELIMINARY INJUNCTION

On the 2nd day of March 1945, there came on for hearing the motion of plaintiff, United States of America, for a preliminary injunction restraining the foreign corporate defendants and after reading the verified complaint and the affidavits submitted by plaintiff and defendants and hearing argument and duly considering the same (but without considering the question whether the foreign corporate defendants are doing business in the United States, which question is not before the Court on this motion, and without prejudice to the rights of the foreign corporate defendants to have such question and the question of the sufficiency of service of process determined later), this Court, for the purposes of this motion only, adopts and incorporates herein as findings

of fact the facts alleged in said complaint and upon said complaint and said affidavit finds as facts: that defendants are foreign corporations and they could quickly withdraw their assets from the United States before the entry of a final decree in this cause; that if the preliminary injunction were denied, they would in all probability do so, in which event, if the Government should succeed in establishing its cause, there would be no way to enforce the decree of the court; and that the resulting damage to the Government would be incomparably greater than any damage to the corporate defendants if the preliminary injunction were granted; and this Court concludes as a matter of law that under Section 4 of the Sherman Act and Section 377 of Title 28 USCA the Court has power to issue a preliminary injunction in the terms of the order which follows and that the court should and does hereby exercise its discretion so to do and it is therefore, on motion of the plaintiff,

ORDERED that the foreign corporate defendants, namely, Societe Internationale Forestiere et Miniere du Congo, Companhia de Diamantes de Angola, Societe Miniere du Beceka, Societe Generale de Belgique, De Beers Consolidated Mines, Ltd., Diamond Trading Company, Ltd., Diamond Corporation, Ltd., Consolidated African Selection Trust, Ltd., and Sierra Leone Selection Trust Ltd., each and all of them, their officers, agents, servants, employees and attorneys and all persons having notice of this order be enjoined from withdrawing money belonging to the corporate defendants from banks in the United States and from withdrawing diamonds or other property belonging to the corporate defendants from safe deposit boxes in the United States and from withdrawing from the United States or selling, transferring or otherwise disposing of property belonging to the corporate defendants in the United States until this case has been finally determined and said foreign corporate defendants have complied with all orders and decrees which may be or have been rendered against them in this cause and that all persons

having notice of this order be enjoined from assisting said corporate defendants, their officers, agents, servants, employees and attorneys to violate this order; and it is further

ORDERED that this preliminary injunction shall not apply to monies or funds which, after January 29, 1945, are paid or transmitted abroad through banks in the United States for account of or credit to any of the corporate defendants by or on behalf of persons other than the corporate defendants, where such payments or transfers are made for diamonds to be delivered from outside the United States to or for the account of such persons; nor shall this order apply to diamonds so purchased after January 29, 1945; and this preliminary injunction shall not apply to funds sent by the foreign corporate defendants from outside of the United States after January 29, 1945 nor to mining machinery equipment and supplies purchased for shipment abroad, or expenses incident thereto, paid for out of any of said funds sent from outside the United States after January 29, 1945. Any bank through which any payment or transfer is made after January 29, 1945 for credit to or account of any of the corporate defendants by or on behalf of persons other than the corporate defendants and any bank which receives any payment or transfer of funds made on behalf of the corporate defendants from outside the United States after January 29, 1945 may assume, in the absence of knowledge to the contrary, that this order does not apply to such payment or transfer or any further payment or transfer of such funds; and it is further

ORDERED that this preliminary injunction shall be and remain subject to the provisions of the two orders signed and and filed on January 31, 1945, modifying the temporary restraining order signed and filed on January 29, 1945 and the order of March 16, 1945 exempting certain property from the temporary restraining order; and it is further

ORDERED that this order be filed forthwith in the office of the Clerk of this Court and entered on record.

Issued at New York, New York, on this 3rd day of April, 1945 at 1:30 o'clock P. M.

SAMUEL MANDELBAUM
United States District Judge

U. S. District Court
Filed
April 3, 1945—2:10 P. M.
S. D. of N. Y.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *Plaintiff*. v. DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD., DIAMOND TRADING COMPANY, LTD., SOCIETE GENERALE DE BELGIQUE, SOCIETE MINIERE DU BECEKA, SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO, COMPANHIA DE DIAMANTES DE ANGOLA, CONSOLIDATED AFRICAN SELECTION TRUST, LTD., SIERRA LEONE SELECTION TRUST, LTD., RUSSELL JOHNSON PARKER, LUTE J. PARKINSON, HERBERT H. VREELAND, ALBERT E. THIELE, SOLOMON R. GUGGENHEIM, CLENDENIN J. RYAN, AND GEORGE K. STURM, *Defendants*.	Civil No. 29-446

ORDER DENYING STAY OF PRELIMINARY INJUNCTION

Defendants, De Beers Consolidated Mines, Ltd., Diamond Corporation, Ltd. and Diamond Trading Company, Ltd., reserving their objection to the jurisdiction of the Court over their persons, through their attorneys, having applied to the undersigned in Chambers for a stay of the provisions of the first "ORDERED" paragraph of the preliminary injunction issued herein on the 3rd day of April, 1945, pending the application by said defendants to the Supreme Court of the United States for a writ of certiorari to review said preliminary injunction and until the determination by the Supreme Court of said application, and in the event that the petition for the writ of certiorari is granted, until final decision of

the case by said Supreme Court, and for a like stay pending appeal by said defendants from said preliminary injunction to the United States Circuit Court of Appeals for the Second Circuit, and until the hearing and determination of said appeal by said Circuit Court of Appeals, and after hearing counsel for the said defendants in support of said application and counsel for the Government in opposition thereto, it is

ORDERED that said application for a stay as aforesaid be, and hereby is, in all respects denied.

April 3, 1945.

SAMUEL MANDELBAUM
United States District Judge

U. S. District Court
Filed
April 4, 1945
S. D. of N. Y.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,

v.

DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD., DIAMOND TRADING COMPANY, LTD., SOCIETE GENERALE DE BELGIQUE, SOCIETE MINIERE DU BECEKA, SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO, COMPANHIA DE DIAMANTES DE ANGOLA, CONSOLIDATED AFRICAN SELECTION TRUST, LTD., SIERRA LEONE SELECTION TRUST, LTD., RUSSELL JOHNSON PARKER, LUTE J. PARKINSON, HERBERT H. VREELAND, ALBERT E. THIELE, SOLOMON R. GUGGENHEIM, CLENDENIN J. RYAN, AND GEORGE K. STURM,
Defendants.

IT IS HEREBY STIPULATED AND AGREED that Exhibits A-1 and A-2 (consisting of two bound books of advertising matter) to the affidavit of Warner S. Shelly, sworn to March 23, 1945, and filed herein on behalf of defendants, De Beers Consolidated Mines, Ltd., Diamond Corporation, Ltd. and Diamond Trading Company, Ltd., be transmitted as original exhibits and shall constitute part of the transcript of record certified by the above Court to the Supreme Court of the United States in connection with the petition of said defendants to said Supreme Court of the United States for a writ of certiorari to review the decision and order of this Court granting a preliminary injunction in said action, and counsel for said defendants and for the Government may refer to said exhibits in their briefs and oral argument in said Supreme Court with the same force and effect as if said exhibits were formally included in the printed transcript of record, and it is further

STIPULATED that said exhibits shall be returned to the office of the clerk of the United States District Court for the Southern District of New York promptly after they shall have served their purpose in the Supreme Court of the United States.

Dated: April 4, 1945.

EDWARD S. STIMSON
Special Assistant to the Attorney General of the United States, attorney for Plaintiff.

CRAVATH, SWAINE & MOORE
Attorneys for Defendants, De Beers Consolidated Mines, Ltd., Diamond Corporation, Ltd. and Diamond Trading Company, Ltd.

SO ORDERED:

April 4th, 1945.

HENRY W. GODDARD,
United States District Judge

U. S. District Court
Filed
April 4, 1945
S. D. of N. Y.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA,
Plaintiff,

against

DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD., DIAMOND TRADING COMPANY, LTD., *et al.*,
Defendants.

STIPULATION AS TO RECORD

IT IS HEREBY STIPULATED AND AGREED that the foregoing is a true transcript of the record of the United States District Court for the Southern District of New York in the above-entitled matter, as agreed upon by the parties.

Dated, New York, April , 1945.

Attorneys for Defendants, De Beers Consolidated Mines, Ltd., Diamond Corporation, Ltd. and Diamond Trading Company, Ltd.

Special Assistant to the Attorney General of the United States, Attorney for Plaintiff.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA,
Plaintiff,

against

DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD., DIAMOND TRADING COMPANY, LTD., *et al.*,
Defendants.

CLERK'S CERTIFICATE

I, GEORGE J. H. FOLLMER, Clerk of the District Court of the United States of America for the Southern District of New York, DO HEREBY CERTIFY that the foregoing is a correct transcript of the record of said District Court in the above-entitled matter, as agreed upon by the parties.

IN TESTIMONY WHEREOF I have caused the seal of said Court to be hereunto affixed, in the City of New York, in the Southern District of New York, this day of April, in the year of our Lord One thousand nine hundred and forty-five and of the independence of the said United States the One hundred and sixty-ninth.

GEORGE J. H. FOLLMER,
Clerk.

[SEAL]

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 23, 1945.

The petition herein for a writ of certiorari to the District Court of the United States for the Southern District of New York is granted. The case is transferred to the summary docket and assigned for argument immediately following Nos. 1016 and 1017. Counsel are requested to discuss in their briefs and upon oral argument the question whether the order of the District Court may appropriately be reviewed at the present stage of the proceedings by a writ of certiorari under section 262 of the Judicial Code.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 1190

SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO AND COMPANHIA DE DIAMANTES DE ANGOLA, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR CERTIORARI FILED APRIL 23, 1945.

CERTIORARI GRANTED APRIL 23, 1945.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944.

No.

SOCIETE INTERNATIONALE FORESTIERE et MINIERE du CONGO, and COMPANHIA de DIAMANTES de ANGOLA, PETITIONERS,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

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Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

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IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

CIVIL ACTION FILE NO. 29-446.

UNITED STATES OF AMERICA,

Plaintiff,

v.

DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD., DIAMOND TRADING COMPANY, LTD., SOCIETE GENERALE DE BELGIQUE, SOCIETE MINIERE DU BECEKA, SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO, COMPANHIA DE DIAMANTES DE ANGOLA, CONSOLIDATED AFRICAN SELECTION TRUST, LTD., SIERRA LEONE SELECTION TRUST, LTD., RUSSELL JOHNSON PARKER, LUTE J. PARKINSON, HERBERT H. VREELAND, ALBERT E. THIELE, SOLOMON R. GUGGENHEIM, CLENDENIN J. RYAN, and GEORGE K. STURM,

Defendants.

SUMMONS—Filed January 29, 1945.

To the above ~~named~~ Defendants:

You are hereby summoned and required to serve upon Lawrence S. Apsey, Herbert A. Berman, Patrick A. Gibson, and Edward S. Stimson, Special Assistants to the Attorney General, plaintiff's attorneys, whose address Fourteenth Floor, 30 Broad Street, New York 4; New York, an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

/s/ GEORGE H. FOLLMER
Clerk of Court.

(Seal of Court)

Date: January 29, 1945.

Return on Service of Writ.

I hereby certify and return that I served a copy of the Summons, Complaint, Affidavits, Application for Temporary Restraining Order, Temporary Restraining Order and Motion for Preliminary Injunction on the following defendants, to-wit:

Date 1945	*Served*
	De Beers Consolidated Mines, Ltd. By Serving:
Jan. 30	Sydney H. Ball at 26 Beaver Street, New York, N. Y. as general agent and cashier.
" 30	Rogers, Mayer & Ball by Lucius Mayer, partner, at 26 Beaver Street, New York, N. Y. as general agent and cashier.
" 30	N. W. Ayer & Son, Inc. by Howard G. Rosen, Vice President, at 30 Rockefeller Plaza, New York, N. Y. as general agent and cashier.
	Diamond Corporation, Ltd.
Jan. 30	Sydney H. Ball at 26 Beaver Street, New York, N. Y. as general agent and cashier.
" 30	Rogers, Mayer & Ball by Lucius Mayer, partner, at 26 Beaver Street, New York, N. Y. as general agent and and cashier.
" 30	N. W. Ayer & Son, Inc. by Howard G. Rosen, Vice President, 30 Rockefeller Plaza, New York, N. Y. as general agent and cashier.
" 30	Banque Diamantaire Anversoise S. A. by Michael Romanenko, at 30 Rockefeller Plaza, New York, N. Y. as general agent and cashier.
	Diamond Trading Corporation, Ltd.
Jan. 30	Sydney H. Ball at 26 Beaver Street, New York, N. Y. as general agent and cashier.
" 30	Rogers, Mayer & Ball by Lucius Mayer, partner, 26 Beaver Street, New York, N. Y. as general agent and cashier.
" 30	N. W. Ayer & Son, Inc. by Howard G. Rosen, Vice President, 30 Rockefeller Plaza, New York, N. Y. as general agent and cashier.

Date	*Served*
1945	
" 30	BANQUE DIAMANTAIRE ANVERSOISE S. A. by Michael Romanenko, at 630 Fifth Avenue, New York, N. Y. as general agent and cashier.
	SOCIETE GENERALE DE BELGIQUE.
Jan. 31	EDGAR SENGIER at 41 Broad Street, New York, N. Y. as general agent and cashier.
" 30	AFRICAN METALS CORPORATION by Richard Terwagne, Vice President at 41 Broad Street, New York, N. Y. as general agent and cashier.
" 30	INDUSTRIAL SALES CORPORATION by A. Scotto, Asst. Treasurer, at 500 Fifth Avenue, New York, N. Y. as general agent and cashier.
Feb. 1	JULIEN J. LEROY at 41 Broad Street, New York, N. Y. as general agent and cashier.
	SOCIETE MINIERE DU BECEKA.
Jan. 30	SYDNEY H. BALL, 26 Beaver Street, New York, N. Y. as general agent and cashier.
" 30	GEORGE K. STURM, 26 Beaver Street, New York, N. Y. as general agent and cashier.
" 30	ROGERS, MAYER & BALL by Lucius Mayer, partner, 26 Beaver Street, New York, N. Y. as general agent and cashier.
	SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO.
Jan. 30	SYDNEY H. BALL, 26 Beaver Street, New York, N. Y. as general agent and cashier.
" 30	GEORGE K. STURM, 26 Beaver Street, New York, N. Y. as general agent and cashier.
" 30	ROGERS, MAYER & BALL by Lucius Mayer, partner, at 26 Beaver Street, New York, N. Y. as general agent and cashier.
" 31	ALBERT E. THIELE at 120 Broadway, New York, N. Y. as Director.
	COMPANHIA DE DIAMANTES DE ANGOLA.
Jan. 30	SYDNEY H. BALL, 26 Beaver Street, New York, N. Y. as general agent and cashier.

7

8

9

	Date 1945	Served
10	" 30	GEORGE K. STURM, 26 Beaver Street, New York, N. Y. as general agent and cashier.
	" 30	ROGERS, MAYER & BALL by Lucius Mayer, partner, at 26 Beaver Street, New York, N. Y. as general agent and cashier.
	" 31	ALBERT E. THIELE at 120 Broadway, New York, N. Y. as a Director.
		CONSOLIDATED AFRICAN SELECTION TRUST, LTD.
	Jan. 30	RUSSELL JOHNSON PARKER at 120 Broadway, New
11		York, N. Y. as managing Director and general agent.
		SIERRA LEONE SELECTION TRUST, LTD.
	Jan. 30	RUSSELL JOHNSON PARKER at 120 Broadway, New York, N. Y. as managing Director and general agent.
	Jan. 31	RUSSELL JOHNSON PARKER in person at 120 Broadway, New York, N. Y.
	Jan. 31	ALBERT E. THIELE, in person at 120 Broadway, New York, N. Y.
	Jan. 30	GEORGE K. STURM in person at 26 Beaver Street, New York, N. Y.

12 I hereby certify further that I am unable to find the following defendants in my district, to wit:

LUTE J. PARKINSON
HERBERT H. VREELAND
SOLOMON R. GUGGENHEIM
GLENDENIN J. RYAN

JAMES E. MULCAHY,
U. S. Marshal, S. D. N. Y.

ENDORSED:
U. S. District Court
Filed: Feb. 5, 1945
S. D. of N. Y.

RETURN OF SERVICE ON WRIT. 13

I hereby certify, that upon the 17th day of February, 1945, in my District, I personally served the within additional summons and complaint upon the within-named Solomon R. Guggenheim, Trillora Court, Port Washington, N. Y., by leaving a copy thereof at his home with his adult superintendent, William Wilstead, who lives with him.

Dated, February 17, 1945.

SPENCER C. YOUNG,
United States Marshal,
Eastern District of New York,
per Rollo S. Criger, Deputy. 14

U. S. District Court,
Filed February 21, 1945
S. D. of N. Y.

IN UNITED STATES DISTRICT COURT.

[TITLE OMITTED.]

COMPLAINT—Filed January 29, 1945.

The United States of America, Plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this action against the defendants and complains and alleges as follows: 15

I.

JURISDICTION AND VENUE.

1. This complaint is filed and this action is instituted against the defendants under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies" commonly known as the Sherman Antitrust Act, and under the Act of Congress of August 27, 1894, c. 349, Sec. 74, 28 Stat. 570, as amended, entitled "An Act to reduce taxation, to provide revenue

16 for the Government, and for other purposes" commonly known as the Wilson Tariff Act, in order to prevent and restrain continuing violations by defendants, as hereinafter alleged, of Sections 1 and 2 of the Sherman Act and Section 73 of the Wilson Tariff Act.

2. All of the corporate defendants do business in the United States and more particularly transact business in the Southern District of New York, have done so continuously for many years, and are found therein. Companhia de Diamantes de Angola (hereinafter called Diamang) has an office in the Southern District of New York. The individual defendants, Herbert H. Vreeland, Albert E. Thiele,
17 Lute J. Parkinson, and Russell Johnson Parker reside in the Southern District of New York.

II.

Defendants.

Corporate Defendants.

3. De Beers Consolidated Mines, Ltd. (hereinafter called De Beers), a corporation organized in 1888 under the laws of the Colony of the Cape of Good Hope, South
18 Africa, and now existing under the laws of the Province of the Cape of Good Hope, Union of South Africa, with an office and principal place of business at 36 Stockdale Street, Kimberley, Cape of Good Hope, Union of South Africa, is made a defendant.

4. Diamond Corporation, Limited (hereinafter called Diamond Corporation), a corporation organized in 1930 and now existing under the laws of the Union of South Africa, with its principal office and place of business at Kimberley, Cape of Good Hope, Union of South Africa, is made a defendant. De Beers owns 80% of its outstanding stock and the remaining 20% is owned by Consolidated Diamond Mines of South West Africa, Limited (hereinafter called Consolidated Diamond Mines).

5. Diamond Trading Company, Limited (hereinafter called Diamond Trading Company) a corporation organized in 1934 and now existing under the laws of the Union of South Africa with its principal office and place of business in London, England, and an office and place of business in Kimberley, Cape of Good Hope, Union of South Africa, is made a defendant. De Beers and Diamond Corporation each own 50% of its stock. 19

6. Societe Generale de Belgique (hereinafter called Societe Generale), a corporation organized about 1903 (as a successor to corporations organized in 1822 and 1830), and now existing under the laws of the Kingdom of Belgium, is made a defendant. It owns approximately 3,500 of the approximately 5,000 industrial enterprises in Belgium and more than 50% of the mining, power, and raw materials industries of the Belgian Congo. It owns 77% of the 40,000 outstanding shares of the corporation designated below as Beceka and owns stock in Forminiere and Diamang. 20

7. Societe Minigre du Beceka (hereinafter called Beceka), a corporation organized in 1919 and now existing under the laws of the Belgian Congo, is made a defendant. It owns deposits which are the principal source of the world's industrial diamonds.

8. Societe Internationale Forestiere et Miniere du Congo (hereinafter called Forminiere), a corporation organized in 1906 and now existing under the laws of the Belgian Congo, with its principal office and place of business at Tshikapa, Belgian Congo, is made a defendant. It works the diamond deposits owned by Beceka and is the largest producer of diamonds in the Belgian Congo. Ninety-eight per cent of the diamonds it produces are industrial diamonds. 21

9. Diamang, a corporation organized in 1917 and now existing under the laws of Portugal, with its principal office at Lisbon, Portugal, is made a defendant. It produces substantially all diamonds mined in Portuguese Angola.

22 10. Consolidated African Selection Trust, Limited (hereinafter called Consolidated Selection), a corporation organized in 1924 and now existing under the laws of the United Kingdom, is made a defendant. It owns extensive diamond producing properties and is the largest diamond producer in the Gold Coast.

11. Sierra Leone Selection Trust, Limited (hereinafter called Sierra Selection), a corporation organized in 1934 and now existing under the laws of the United Kingdom, is made a defendant. It is a wholly owned subsidiary of Consolidated Selection and produces practically all diamonds that are produced in Sierra Leone.

23

Individual Defendants.

12. Herbert H. Vreeland, a resident of New York City, is made a defendant. He is now and since before 1924 has been a stockholder and director of both Forminière and Diamang.

13. Albert E. Thiele, a resident of Scarsdale, New York is made a defendant. He is a stockholder and director of both Forminiere and Diamang.

14. Solomon R. Guggenheim, a resident of Port Washington, Long Island, New York, is made a defendant. He
24 is now and since before 1923 has been a stockholder in Forminiere and Diamang.

15. Clendenin J. Ryan, a resident of Hackettstown, New Jersey, is made a defendant. He is and since before 1923 has been a stockholder of Forminiere and Diamang.

16. George K. Sturm, a resident of Woodbridge, New Jersey, is made a defendant. He is a stockholder and auditor of Forminiere.

17. Herbert H. Vreeland, Albert E. Thiele, Solomon R. Guggenheim, Clendenin J. Ryan and George K. Sturm are the American stockholders of Forminière. They hold stock therein under a voting trust agreement called the Congo Mines Participation Agreement. The interests and voting

rights in Forminiere so held by said individual defendants 25
are substantial, and they acting together with Societe Generale control Forminiere.

18. Lute J. Parkinson, a resident of New York City, is made a defendant. He is now and for many years has been assistant general manager and an agent of De Beers.

19. Russell Johnson Parker, a resident of New York City, is made a defendant. He is now and since before 1925 and 1934, respectively, has been managing director of Consolidated Selection and Sierra Selection.

20. Each of the individual defendants has participated and now participates in the direction and management of 26
the defendant corporations employing him or of which he is an officer or stockholder, and particularly in those corporate affairs, policies, and acts described in this complaint. Each of the individual defendants has authorized, ordered, or done some or all of the acts done by his corporation constituting the offenses hereinafter complained of.

III.

The Trade and Commerce Involved

Importance of Industrial Diamonds. 27

21. The diamond is the hardest known substance and a strategic war and industrial material. Diamonds and boart, a diamantine substance containing impurities, are used in cutting, grinding, and boring hard materials such as metals, stone, etc. They are more effective than other cutting or abrasive materials where speed and precision are required. Being harder, they are used for truing other cutting materials. Particular uses of diamonds include the following: Diamond drills, saws, shaping tools, gear grinders, thread grinders and wire drawing dies are used in making gunsights, bombsights, binoculars, compasses, chronometers, gauges, radio wire, magnetos, dynamos, transformers, electric motors, and pistons and crankshaft

bearings for airplane motors. Diamond tools are used to true the abrasive wheels used in making crankshafts, camshafts, valves and connecting rods, and to true the tungsten carbide tools used in the manufacture of shells.

22. Where hereinafter used, the term diamonds, unless otherwise specified, refers to rough diamonds, including uncut gem diamonds, industrial diamonds and boart.

Sources of Industrial Diamonds and Boart.

23. The diamonds which are used in industry are those diamonds not suitable for use as gems because of impurities and imperfections. Industrial diamonds come from both pipe mines and alluvial deposits and are mined together with gem diamonds from these sources. Industrial diamonds are the residue after the gem stones have been sorted out. The earlier important commercial sources of diamonds were pipe mines; all pipe mines of any importance are located in the Union of South Africa. After 1914, the other commercial source of diamonds, alluvial deposits, were discovered in the Belgian Congo, Portuguese Angola, Gold Coast, and Sierra Leone. There are minor alluvial deposits in other parts of Africa and in South America.

24. Eighty per cent by weight of the world's production of diamonds is used for industrial purposes. Ninety-eight per cent by weight of the Belgian Congo, sixty per cent of the Gold Coast and Sierra Leone, fifty per cent of the South African, and forty per cent of Angola production of diamonds are suitable for industrial uses only.

Ownership and Control of Diamond Deposits.

25. De Beers, directly or through subsidiaries, has acquired and now owns all of the important pipe mines in Africa and thus controls all pipe mines of any importance. De Beers directly or through subsidiaries also has acquired

many less important pipe mines with the sole intent and 31
purpose of closing them down so as to keep their production off the market; upon acquisition operations at these mines were discontinued and have never been renewed.

26. De Beers has also acquired and now controls the principal alluvial diamond mining companies of South Africa. It purchased the stock of Cape Coast Exploration Company, Limited, liquidated the company, and took over its assets. De Beers purchased 41% of the stock of Consolidated Diamond Mines of South West Africa, Limited (hereinafter called Consolidated). Anglo-American Investment Trust, Limited, owns some stock in Consolidated. Ernest Oppenheimer is chairman of the boards of De Beers, 32
Anglo-American, and Consolidated.

27. The Belgian Congo diamond deposits are owned by Beceka and other subsidiaries of Societe Generale. Forminiere mines these deposits under contracts with the owning companies. Diamond deposits in Portuguese Angola are owned and operated by Diamang. Gold Coast, Sierra Leone, and certain other African diamond deposits are owned and mined by Consolidated Selection and its subsidiaries, including Sierra Selection.

28. The defendant corporations and their subsidiaries produce and sell approximately 99% of all the diamonds 33
produced in Africa, and approximately 95% of all the diamonds produced in the world.

Market in the United States.

29. The principal market for industrial as well as gem diamonds is in the United States. In 1942 and 1943 imports of all diamonds and of industrial diamonds into the United States were in excess of the world's production of all diamonds and of industrial diamonds, respectively, in those years. There is a continuous stream of diamonds and boart from Africa to England, and thence to the United States. This stream of shipments is a part of the foreign trade and commerce of the United States.

IV.

The Violations of Law.

30. For many years up to and including the date of the filing of this complaint, defendants have been continuously and now are engaged in a combination and conspiracy to restrain and monopolize trade and commerce of the United States with foreign nations in gem diamonds, industrial diamonds, and boart, and have been and now are parties to contracts, agreements, and understandings in restraint of trade and commerce of the United States with foreign nations, all in violation of Sections 1 and 2 of the Act of
35 Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Antitrust Act. Continuously during said period defendants, some of whom were engaged in importing, have been and now are engaged in a combination and conspiracy in restraint of, and have been and now are parties to contracts and agreements intended to operate in restraint of, lawful trade and free competition in lawful trade and commerce of the United States, and intended to increase the market price in the United States of diamonds, industrial diamonds, and boart imported into the United
36 States, all in violation of Section 73 of the Act of Congress of August 27, 1894, c. 349, 28 Stat. 509, as amended, commonly known as the Wilson Tariff Act. Defendants are continuing and threaten to and will continue said offenses unless the relief hereinafter prayed for in this complaint is granted.

31. The aforesaid combination and conspiracy alleged in the next preceding paragraph have consisted of a continuing agreement and concert of action between defendants: (a) to prevent dealers and consumers in the United States from purchasing diamonds from the producers, (b) to prevent all sale or purchase of diamonds for export to or import into the United States except by purchase through Diamond Trading Company and except subject

to terms and conditions set by defendants, (c) to prevent 37
all persons in the United States other than certain favored brokers, dealers, and cutters from purchasing diamonds from the Diamond Trading Company, (d) to limit the production and supply of diamonds, (e) to limit and restrict the quantity of diamonds imported into the United States, and (f) to fix, stabilize, and enhance the prices at which diamonds are sold in the United States.

32. Defendants have formed and carried out the aforesaid combination and conspiracy by the acts, conduct, and agreements in this complaint described and alleged.

33. The defendants have controlled the marketing of 38
diamonds in the United States and in other countries principally by causing substantially all diamonds produced in Africa to be sold through a single selling agency. Until 1934 that selling agency was a group of London merchants known as the Diamond Syndicate and after 1934 and continuing to the present time it has been Diamond Trading Company. The defendants now cause the Diamond Corporation and the South African Producers Association to acquire from substantially all the producers in Africa all diamonds sold by them and to resell the diamonds so acquired to the Diamond Trading Company exclusively. By these means the defendants obstruct and impede the 39
free flow of diamonds to the United States from the producers or purchasers from them, prevent substantially all purchases of diamonds for export to or import into the United States except by purchase through Diamond Trading Company and except in accordance with terms and conditions set by defendants, and monopolize the sale of diamonds exported to or imported into the United States. The aforesaid arrangements which defendants have used to control the sale of diamonds in the United States and other markets have varied from time to time as hereinafter more fully alleged.

34. Prior to 1920 the producers of diamonds in the Union of South Africa and the Mandate of Southwest

40 Africa (who are hereinafter sometimes collectively referred to as the Conference Producers) agreed with each other to monopolize the supply of diamonds to world markets. For this purpose they formed an association known as the Conference and agreed with each other to limit their production and to sell their diamonds exclusively to a single selling agency, a group of London merchants known as the Diamond Syndicate. All important diamond deposits then being worked were owned or controlled by the Conference Producers.

35. Defendants De Beers is now and was for many years prior to 1920 the most important Conference Producer,
41 controlling the great bulk of the diamond deposits in the areas worked by them and exercising a dominant influence in bringing about and maintaining the agreements above referred to. Other Conference Producers include New Jagersfontein and Premier, both now wholly owned by De Beers, and Consolidated Diamond Mines, which De Beers controls and of whose capital stock De Beers owns 41%.

36. The agreements mentioned in paragraph 34 above were maintained in effect until 1930 when they were replaced with further means to control the production and marketing of diamonds sold by the Conference Producers
42 as hereinafter described.

37. After 1920 there were no further discoveries of important diamond deposits in the Union of South Africa and the Mandate of Southwest Africa. In the Belgian Congo, Portuguese Angola, Sierra Leone, and the Gold Coast, however, previously undeveloped alluvial deposits of great importance came into production from time to time between 1920 and 1930. These deposits are especially rich in industrial diamonds and constitute the principal source of the world's supply of industrial diamonds.

38. In order to maintain the control first established by the Conference Producers over the world market for diamonds, including the United States market, which is the largest and most important diamond market, and to main-

tain high prices for diamonds, both gem and industrial, throughout the world, defendants have continuously eliminated all competition between the Conference Producers and the companies who between 1920 and 1930 came into production in Africa outside of the Union of South Africa and the Mandate of Southwest Africa. Among this later group of producers (hereinafter sometimes collectively referred to as the non-Conference Producers), the most important are defendants Beceka, Forminiere, Diamang, Consolidated Selection, and Sierra Selection and its subsidiaries. Beceka owns and Forminiere operates the richest diamond mine in the world; over 90% of its production by weight consists of industrial diamonds. 43 44

39. For the purposes alleged in paragraph 38 above, from time to time as the non-Conference Producers came into production the Conference Producers and the Diamond Syndicate purchased diamonds from them in large quantities, and as each non-Conference Producer became of importance in diamond production defendants have caused it to enter into contracts with the Diamond Syndicate requiring each such producer to sell its diamonds of all kinds exclusively to the Syndicate. Thus the Syndicate contracted to purchase all diamonds of Diamang in 1923, of Consolidated Selection in 1925, and of Forminiere in 1926. Alluvial deposits were discovered in Lichtenburg and Namaqualand, South Africa, in 1926 and 1927. They were rapidly developed and from 1927 to 1930 they produced large quantities of diamonds and were exhausted. The Syndicate acquired a large part of these diamonds. The aforesaid exclusive purchase contracts between the Diamond Syndicate and Diamang, Forminiere, and Consolidated Selection, as well as such contracts made by the Syndicate with the other non-Conference Producers, were extended and renewed and maintained continously in effect and carried out until 1930 when they were replaced as hereinafter described. 45

40. The Diamond Syndicate and the Conference Producers kept off the market most of the diamonds purchased

46 by them as above described and thus accumulated large stocks which the Diamond Syndicate marketed only from time to time and in a manner designed to maintain high prices for diamonds throughout the world.

41. The depression which began in 1929 made it difficult for the Syndicate to finance the extensive purchase agreements above-mentioned and the carrying of the large stocks of diamonds accumulated and held off the market as aforesaid. In order to relieve the Syndicate and avoid an uncontrolled market, the Conference Producers purchased one-half of the Syndicate's stocks on hand as of July 1, 1929.

47

42. Thereafter, further to assist in financing the aforesaid purchases of diamonds and the carrying of stocks thereof, and to reduce the participation of the Diamond Syndicate in defendants' system of control of the production and marketing of diamonds, defendants in 1930 formed the Diamond Corporation and caused to it to take over from the Conference Producers their aforesaid stocks of diamonds and caused it also to take over from the Diamond Syndicate the latter's aforesaid exclusive purchase contracts, referred to in paragraphs 34 and 39, respectively, with each of the Conference Producers and non-Conference Producers. De Beers and Consolidated Diamond Mines
48 acquired and now own 80% and 20%, respectively, of the stock of Diamond Corporation.

43. From 1930 to about 1933 defendants caused Diamond Corporation to maintain exclusive selling agreements with the Diamond Syndicate and accordingly Diamond Corporation during this period sold its diamonds, which included all diamonds sold by both the Conference Producers and the non-Conference Producers and such amounts as have been marketed from time to time out of the aforesaid accumulated stocks taken over by Diamond Corporation, exclusively to the Diamond Syndicate.

44. In or about 1933 defendants modified their system of control by forming the South African Producers Associa-

tion, Limited (hereinafter called the Producers Association) and by causing all of the Conference Producers to terminate their contracts with Diamond Corporation and to become members of the Producers Association and to enter into contracts with it by which they agreed to sell their diamonds exclusively to it. Diamond Corporation continued its contractual arrangements with the non-Conference Producers whereby they sold their diamonds exclusively to it. Diamond Corporation, however, became a member of the Producers Association and entered into contracts with it by which Diamond Corporation agreed to sell its diamonds exclusively to the Producers Association. The Producers Association which thus acquired the diamonds of all the companies contracted to sell the diamonds so acquired by it exclusively to the Diamond Syndicate. 49 50

45. In or about 1934 defendants completed the concentration of marketing control in their own hands and eliminated the Diamond Syndicate from its previous share in control. For this purpose and to carry out more effectively the purposes hereinbefore alleged defendants formed Diamond Trading Company (of whose capital stock De Beers and Diamond Corporation each took 50%) and caused it to take over from the Diamond Syndicate the latter's exclusive purchase contracts with the Producers Association. Thereby Diamond Trading Company replaced the Diamond Syndicate as the exclusive selling agency for all diamonds produced by the Conference Producers and the non-Conference Producers. Diamond Trading Company renewed and maintained in effect such exclusive purchase contracts with the Producers Association continuously until the present time, with the revision as to industrial diamonds in 1943 as hereinafter described. 51

46. Under the contracts mentioned in the last preceding paragraph, Diamond Trading Company and the Producers Association have agreed from time to time upon the quantities of diamonds that the former buys from the latter. In turn the agreements between the Producers Association and its members, including Diamond Corporation, provide

that the members sell to the Association in such amounts as to replace the diamonds disposed of to world markets by Diamond Trading Company. The members of the Producers Association have from time to time agreed among themselves upon individual quotas to be sold to it by the respective members in filling the total amounts to be sold by it to Diamond Trading Company. Diamond Corporation, in filling its individual quota of sales to the Producers Association, has agreed from time to time with each of the non-Conference Producers upon the individual quotas to be sold by each of them to Diamond Corporation. By these quota restrictions defendants have limited both the production and the marketing of both gem and industrial diamonds by Conference Producers and by non-Conference Producers.

47. In 1943 defendants modified the aforesaid selling agreements to change the course of sale of industrial diamonds. Diamond Corporation no longer sells to the Producers Association the industrial diamonds which Diamond Corporation acquires from the non-Conference Producers but instead purchases from the Producers Association all industrial diamonds which the Producers Association purchases from Conference Producers, and Diamond Corporation now sells industrial diamonds so acquired from both Conference Producers and non-Conference Producers directly to the Diamond Trading Company. The Producers Association continues to sell to Diamond Trading Company all gem diamonds of the Conference Producers and non-Conference Producers in accordance with the agreement alleged in paragraph 45.

48. As a result of the revision of the aforesaid selling agreements the individual quotas allocated to each producer apply only to their sales of gem diamonds, but the quota limitations upon the amount of gem diamonds to be sold by each producer has nevertheless continued to limit the production of industrial diamonds and boart. Gem diamonds are mined in no greater amount than are to be sold under the selling agreements and industrial diamonds and boart are not mined separately from gem diamonds but only

coincidentally therewith since gem diamonds, industrial diamonds and boart are scattered through the same ore. For 1943 the agreed percentage sales quotas for gem diamonds allocated to the members of the Producers Association were: 20% for Diamond Corporation, 47% for De Beers, 17.5% for Consolidated Diamond Mines, and 15.5% for the Union of South Africa. Premiere and New Jagersfontein were not operating, and their quotas were assigned to Diamond Corporation. 55

49. In consequence of the arrangements aforesaid, Diamond Trading Company now controls the purchase and resale of all diamonds of all kinds mined by the Conference Producers and non-Conference Producers and is the sole selling agency for 99% of all diamonds produced in Africa and 95% of all diamonds produced throughout the world. 56

50. De Beers and its subsidiaries have further limited the world's supply of diamonds and enhanced their price throughout the world by shutting down all mines owned and controlled by De Beers and its subsidiaries. Since 1939 sales of diamonds by defendants have been far in excess of the world's production of diamonds. The excess has been met out of large stocks accumulated by defendants as hereinbefore described and held by them in 1939. Since that date they have greatly increased their sales especially of industrial diamonds and have systematically decreased their production of diamonds of all types. 57

51. The monopoly power acquired as aforesaid and exercised by the defendants through Diamond Trading Company has been asserted in arbitrary and unfair treatment of prospective purchasers and customers and by enhancement of diamond prices in the United States to arbitrary and exorbitant levels. These effects have been brought about through additional means of regulating the marketing of diamonds and strict control over sales by Diamond Trading Company to dealers as hereinafter described.

58 52. Diamond Trading Company sells gem diamonds only on four occasions during each year, only in London, and only at so-called "sights", to which only a few selected dealers are admitted. Furthermore gem diamonds at such sights are sold only in series or lots selected by Diamond Trading Company. Each series or lot contains a wide range of different sizes and qualities, representing more or less a cross-section of the gem diamonds that the company has in stock, arbitrarily chosen by Diamond Trading Company. Dealers can buy at the sights only these selections. The dealers selected for admission to sights are permitted to attend them only on condition that they purchase a minimum of £20,000 of diamonds at each sight
59 which they attend. Diamond Trading Company disciplines dealers who fail to make the required purchases. They are refused admission to subsequent sights and thus are denied opportunity further to engage in purchase of gem diamonds. All purchases are required to be paid for in advance.

53. Diamond Trading Company sells industrial diamonds in various ways. It sells in industrial series at sights in London. It sells boart and some kinds of industrial diamonds by classes apart from the series. It sometimes sells direct to purchasers in the United States and other countries on order by direct mail or cable or through
60 brokers.

54. As in the sale of gem diamonds, purchasers of industrial diamonds are required by Diamond Trading Company to pay in advance, before delivery, at the time the goods are ordered. Purchasers who have ordered by mail or cable are not permitted to inspect shipments before accepting delivery, or to refuse to accept shipments or to return them after inspection. Diamond Trading Company requires purchasers to buy unseen, and without warranty or representation, the industrial diamonds or boart shipped, and, having been paid, Diamond Trading Company will not take back the goods or make any adjustment. Diamond Trading Company has included in shipments of material sold as industrial diamonds material which cannot be used

for the desired industrial purposes or for any purposes at all. Purchasers have no recourse and have no other source from which to buy. Purchasers are frequently prevented from buying the type of industrial diamonds needed for their or their customers' industrial operations and are permitted to buy only in series selected arbitrarily by Diamond Trading Company. 61

55. In maintaining the above-described system of complete control of diamond production and marketing, Diamond Trading Company has systematically prevented the accumulation in this country of a stockpile of industrial diamonds. Diamond Trading Company has persistently refused to sell industrial diamonds for stockpiling purposes to agencies of the United States seeking to establish such stockpiles for military reasons. In sales of industrial diamonds to manufacturers and dealers in the United States Diamond Trading Company has systematically prevented purchases by such companies in amounts that would establish for them more than a few months' supply on hand. When it was feared that German arms might invade England and overrun Africa, the Board of Economic Warfare sought to purchase large quantities of industrial diamonds from the defendants to prevent capture of their existing stocks and to create a stockpile here. The Board succeeded only in obtaining an agreement to establish a stockpile in Canada in the possession of defendants, by the terms of which agreement this stockpile in Canada could be drawn upon for sale and use in the United States only as stocks in this country fell below 90% of what they were on June 30, 1942, and then only when such stocks should not be restored to that level by defendant corporations after 60 days' notice. 62 63

56. Diamond Trading Company has increased prices of industrial diamonds during the war by gradually depreciating the quality of industrial series and of most grades and classes of industrial diamonds without reducing prices.

57. The restraints upon production and marketing of diamonds as herein set forth are maintained by defendants

64 for the primary purpose of maintaining diamond prices sold in, or for export to or import into, the United States, where the purchase and use of diamonds is larger than in any other country in the world. That purpose is furthered by numerous acts done or procured to be done in this country by defendants, including those hereinbelow described, and defendants have put the aforesaid conspiracy into operation, made it effective, and carried it out within the United States in the following ways:

(a) De Beers and its subsidiaries have conducted and now carry on an advertising, publicity, and
65 public relations campaign in the United States through its agent, N. W. Ayer & Son, Inc. One object of this campaign is to induce the consuming public in the United States to believe that diamonds are naturally rare and valuable, and that they are inherently worth the retail prices quoted in the advertisements, prices which are several times those which would prevail under competitive conditions. Another object of the campaign and another function of N. W. Ayer & Son, Inc., is to discourage, eliminate and counteract publicity unfavorable to or critical of De Beers and its subsidiaries. At the direction of De Beers, N. W. Ayer & Son, Inc. has induced pub-
66 lishers of magazines not to run articles which in its view would create publicity unfavorable to De Beers and its subsidiaries.

(b) N. W. Ayer & Son, Inc. under the direction of De Beers, regularly and continuously performs many services in the United States for De Beers and its subsidiaries. It investigates retail prices by using shoppers. It has reported on United States Government price regulations for diamonds. It reports complaints made by customers of the Diamond Trading Company. It has reported on the numbers, wages, hours, and union membership of diamond cutters in New York and Philadelphia. Its agents

travel over the United States in the interest of the public relations and publicity campaign. 67

(c) De Beers and its subsidiaries regularly and continuously have sent and now send representatives to the United States to investigate and report on market conditions, to arrange for and supervise advertising, publicity, and public relations work and to investigate complaints, most of which have been made because of defendants' monopolistic practices and the resulting high prices, depreciated quality, limited supply, or exclusion of dealers or other purchasers from the trade.

(d) Diamond Trading Company requests and obtains reports on the credit of American customers from its agent in New York, Banque Diamantaire Anversoise S. A. It also ships packages of diamonds to this bank for delivery to particular customers in the United States. 68

(e) De Beers and its subsidiaries have had and now have diamonds in the United States. Some of these, while they were in the United States, were sold to the United States Government by a representative of De Beers and its subsidiaries who was in the United States. 69

(f) As alleged in paragraph 2 and in paragraphs 12 through 20 above, directors and stockholders of two of the corporate defendants and a managing director, and assistant manager, and agents of some of them reside in this country and are here active in the conduct of the affairs of their respective corporations in effectuation of the aforesaid combination and conspiracy.

(g) Forminiere and Diamang regularly and continuously have purchased and are purchasing machinery, tools, and supplies in the United States for use in their mining operations in Africa. Forminiere

70 is continuously represented by an agent in this country for that purpose.

(h) De Beers and its subsidiaries and Forminiere and Diamang regularly and continuously have maintained and now maintain bank accounts in banks in New York which they use in paying for advertising, publicity, public relations work, and purchases of machinery, tools, and supplies.

(i) Diamond Trading Company, De Beers, its subsidiaries, and other defendants regularly and continuously have used and now use the United States
71 mails for the successful maintenance of their marketing control and the resulting high price level for diamonds to correspond with purchasers in the United States, to ship diamonds to customers in the United States, and to correspond with their advertising, publicity, and public relations agency in the United States, and to carry out the other activities described in this paragraph 57.

(j) De Beers and its subsidiaries have suggested, tampered with, fixed, and maintained, and are suggesting, tampering with, fixing, and maintaining, the United States retail prices of gem diamonds by
72 advertising in the United States the maximum and minimum retail prices for gem diamonds of different weights, thus causing the public to suspect the quality or genuineness of diamonds offered for sale at retail below these prices.

V.

Effects of the Violations of Law

58. Defendants have restrained the trade and commerce of the United States by the aforesaid combination and conspiracy and the contracts, agreements, arrangements, and practices hereinabove described. The said con-

spiracy has had the following effects, among others, within 73
the United States:

(a) Through the aforesaid quota arrangements and exclusive sales arrangements the production of diamonds for sale to the United States markets is restricted and limited.

(b) Through Diamond Trading Company, Diamond Corporation, and the Producers Association monopolistic and exorbitant prices are maintained on all diamonds sold to the United States market. For example, sand boart, which Diamond Corporation buys from Forminiere for two shillings a carat, is resold by Diamond Trading Company to dealers 74
in the United States at seven shillings six pence, which is three and a half times the price paid. The passage of industrial diamonds through the hands of Diamond Corporation and Diamond Trading Company costs the United States Government and manufacturers of war goods in the United States many millions of dollars annually. Of De Beers outstanding stock, 38% is cumulative preferred stock with a cumulative preferred annual dividend of 40%, which has been regularly paid. De Beers' net profits were 44% in 1939, 60% in 1940 and 114% in 1943.

(c) Through exclusive sales arrangements all 75
purchasers for import into or export to the United States and dealers and consumers in the United States are prevented from purchasing diamonds from the producers thereof and are compelled to purchase only diamonds sold by Diamond Trading Company under the terms and conditions of sale established and maintained by defendants through Diamond Trading Company.

(d) Agencies of the United States Government have been prevented from obtaining industrial diamonds and boart and establishing a stockpile in the United States, which they desired for military reasons.

76 (e) Dealers in industrial diamonds and boart in the United States have been and are being dealt with oppressively by Diamond Trading Company by its practice of requiring them to pay for and take industrial diamonds and boart ordered by mail and cable which they have not had an opportunity of examining or inspecting, and as to which they have no recourse although the material is in many cases worthless or selected by Diamond Trading Company arbitrarily in series unfitted to the purchaser's needs. They have also been oppressed by Diamond Trading Company's practice of reducing the quality of the 77 several grades and classes of industrial diamonds and boart sold.

(f) Individuals and firms in the United States other than certain favored brokers, dealers, and cutters have been and are prevented from purchasing diamonds from the Diamond Trading Company.

VI.

Prayer

Wherefore, the plaintiff prays:

78 (1) That the Court adjudge and decree that the defendants have combined and conspired to restrain and monopolize, and have agreed and contracted to restrain, foreign trade and commerce of the United States in violation of Sections 1 and 2 of the Sherman Antitrust Act, and that defendants, some of whom were engaged in importing, have been engaged in a combination and conspiracy and have been parties to agreements and contracts intended to operate in restraint of lawful trade and free competition in lawful trade and commerce of the United States and intended to increase the market price in the United States of gem diamonds, industrial diamonds, and boart imported into the United States, all in violation of Section 73 of the Wilson Tariff Act.

(2) That defendants and each of them and their successors, officers, directors, agents, representatives, and all persons and corporations acting on their behalf be perpetually enjoined from combining, conspiring, agreeing, or contracting to restrain or monopolize trade and commerce of the United States with foreign nations in gem diamonds, industrial diamonds, and boart, and that they be perpetually enjoined from engaging in or participating in practices, contracts, relationships or understandings having the purpose or effect of continuing, reviving, or renewing any of the aforesaid violations of the Sherman Antitrust Act and the Wilson Tariff Act. 79

(3) That defendants, their subsidiaries, successors, stockholders, officers, directors, agents, representatives, and all persons and corporations acting on their behalf be perpetually enjoined from carrying out any existing contracts, agreements, understandings, or arrangements insofar as any such contracts, agreements, understandings, or arrangements shall prohibit or prevent sales by them, or any of them, for import into, or for resale for import into, the United States. 80

(4) That each defendant be enjoined from practicing in concert with any other defendant any policy or from entering into any agreement with any other defendant having the purpose or effect of limiting or restricting import of diamonds into the United States or of enhancing, fixing, stabilizing, or influencing the prices at which diamonds are sold in the United States. 81

(5) That, in order to prevent the withdrawal, transfer or dissipation of assets in the United States until such time as this Court shall have determined the issues in this case and defendant corporations shall have complied with its orders, the corporate defendants be restrained and enjoined from withdrawing money from banks in the United States and from withdrawing diamonds or other property from safe deposit boxes in the United States and from withdrawing from the United States or selling, transferring, or otherwise disposing of property in the United States.

82 (6) That the plaintiff have such other, further, and different relief as the nature of the case may require and the court may deem just and proper.

(7) That pursuant to Section 5 of the Sherman Act, an order be made and entered herein requiring such of the defendants as are not within this district to be brought before the court in this proceeding as parties defendant and directing the marshal of the district in which they severally reside to serve summons upon them.

s/ FRANCIS BIDDLE
Attorney General.

s/ HERBERT A. BERMAN
PATRICK A. GIBSON

83

s/ WENDELL BERGE
Assistant Attorney General.

s/ EDWARD F. STIMSON
Special Assistants to the
Attorney General.

JOHN F. X. McGOHEY
United States Attorney
Southern District of New York.

s/ LAWRENCE S. APSEY
Special Assistant to the
Attorney General.

(Verification, oath and seal omitted.)

84

IN UNITED STATES DISTRICT COURT.

[TITLE OMITTED.]

APPLICATION FOR TEMPORARY RESTRAINING ORDER—
Filed January 29, 1945.

The United States of America, plaintiff, upon the facts shown by the verified complaint and by the affidavits of Edward S. Stimson filed herewith, moves the Court for a temporary restraining order without notice restraining the above named foreign corporate defendants, Societe Internationale Forestiere et Miniere du Congo, Companhia de

Diamantes de Angola, Societe Minere du Beceka, Societe Generale de Belgique, De Beers Consolidated Mines, Ltd., Diamond Trading Company, Ltd., Diamond Corporation, Ltd., Consolidated African Selection Trust, Ltd. and Sierra Leone Selection Trust, Ltd., from withdrawing money from banks in the United States and from withdrawing diamonds or other property from safe deposit boxes in the United States and from withdrawing from the United States or selling, transferring or otherwise disposing of property in the United States pending the issuance of a preliminary injunction for the same purpose with the object of preventing the withdrawal, transfer or dissipation of assets in the United States until such time as this Court shall have determined the issues in this case and defendant corporations shall have complied with its orders. 85 86

Plaintiff moves the Court for the aforesaid temporary restraining order without notice because without it the aforesaid corporate defendants could withdraw deposits from banks in the United States and diamonds from safe deposit boxes in the United States, and dispose of other property in the United States before a hearing could be had and a temporary injunction issue, and should these withdrawals occur this Court would be powerless to enforce any order or decree against these foreign corporate defendants and the United States of America would suffer irreparable injury. 87

/s/ Herbert A. Berman

/s/ Patrick A. Gibson

/s/ Edward S. Stimson

Special Assistants to the Attorney General, Attorneys for the Plaintiff.

88 IN UNITED STATES DISTRICT COURT.

[TITLE OMITTED.]

TEMPORARY RESTRAINING ORDER—Filed January 29, 1945.

This 29 day of January, 1945, there came on for hearing the application of the United States of America for a temporary restraining order without notice, and it clearly appearing from specific facts shown by the verified complaint herein and by the affidavits of Edward S. Stimson that immediate and irreparable injury may result to the United States of America before notice can be served and
89 a hearing had upon said motion, in that the corporate defendants could quickly withdraw their assets from the United States and thus prevent enforcement of any order or decree which this Court may render because, although they do business in the United States, their principal properties are in foreign countries and their principal business is carried on there; and it further appearing that this order should be granted without notice because notice would give the foreign corporate defendants an opportunity to remove bank deposits, diamonds and other property from the United States, leaving the Court with a right to punish for contempt but with no means of carrying out such a
90 disciplinary measure or of enforcing a decree or order against said foreign corporate defendants, it is now

ORDERED that said foreign corporate defendants, namely, Societe Internationale Forestiere et Miniere du Congo, Companhia de Diamantes de Angola, Societe Miniere du Beceka, Societe Generale de Belgique, Beers Consolidated Mines, Ltd., Diamond Trading Company, Ltd., Diamond Corporation, Ltd., Consolidated African Selection Trust, Ltd., and Sierra Leone Selection Trust, Ltd., each and all of them, their officers, agents, servants, employees and attorneys, and all persons having notice of this order, be restrained from withdrawing money from banks in the United States and from withdrawing diamonds or other property from safe deposit boxes in the United States and

from withdrawing from the United States or selling, transferring or otherwise disposing of property in the United States, and that all persons having notice of this order be enjoined from assisting said corporate defendants, their officers, agents, servants, employees and attorneys to violate this order; and it is further 91

ORDERED that this restraining order shall expire upon the decision of plaintiff's motion for a preliminary injunction or ten days from the date and hour of its issuance as hereinafter endorsed hereon, whichever is sooner, unless extended or dissolved by further order; and it is further

ORDERED that plaintiff's motion for a preliminary injunction be set down for hearing on the 2nd day of February, 1945 at 10:30 o'clock A. M. in Room 506 of this Court House; and it is further 92

ORDERED that service upon the corporate defendants on or before 6 P. M. of the 30th day of January, 1945, of notice that plaintiff's motion for a preliminary injunction will be heard at the aforesaid time shall be deemed a timely notice; and it is further

ORDERED that this order be filed forthwith in the office of the Clerk of this Court and entered of record.

Issued at New York, New York, on this 29th day of January, 1945, at 11:18 o'clock A. M. 93

/s/ VINCENT L. LEIBELL,
United States District Judge.

94 IN UNITED STATES DISTRICT COURT.

[TITLE OMITTED.]

AFFIDAVIT OF EDWARD S. STIMSON—January 29, 1945.

STATE OF NEW YORK,
COUNTY OF NEW YORK,

EDWARD S. STIMSON, being first duly sworn, says that he is a Special Assistant to the Attorney General with headquarters in the Department of Justice Building in Washington, D. C., that he has made the investigation and
95 prepared the complaint in the above entitled cause and there is a great danger that the Court will be unable to enforce its orders, that its jurisdiction will be defeated and that irreparable injury will result to the United States of America unless a temporary restraining order without notice issues enjoining the foreign corporate defendants, Societe Internationale Forestiere de Minere du Congo, Companhia de Diamantes de Angola, Societe Minere du Beceka, Societe Generale de Belgique, De Beers Consolidated Mines, Ltd., Diamond Trading Company, Ltd., Diamond Corporation, Ltd., Consolidated African Selection Trust, Ltd., and Sierra Leone Selection Trust, Ltd., from
96 withdrawing money from banks in the United States and from withdrawing diamonds or other property from safe deposit boxes in the United States and from withdrawing from the United States or selling, transferring or otherwise disposing of property in the United States.

If said property is withdrawn or transferred as aforesaid the injury will be irreparable because sequestration of said property is the only means which this Court has of enforcing any order to decree which it may render against said foreign corporate defendants. The principal business and activities of said defendants are carried on in foreign countries and they could quickly withdraw their assets from the United States and so prevent enforcement of any order or decree which the Court may render. In

this way the jurisdiction which this Court has obtained over 97
these defendants would be fruitless because the means of enforcing the final decree would have been removed.

The temporary restraining order should be granted without notice because notice would give defendant foreign corporations an opportunity to remove bank deposits, diamonds and other property from the United States leaving the Court with a possible right to punish for contempt but with no means of carrying out such a disciplinary measure or of enforcing a decree or order against said foreign defendants.

No previous application for similar relief has been made. 98

/s/ EDWARD S. STIMSON

EDWARD S. STIMSON

(Oath and Seal Omitted)

IN UNITED STATES DISTRICT COURT.

[TITLE OMITTED.]

AFFIDAVIT OF EDWARD S. STIMSON—January 29, 1945. 99

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

EDWARD S. STIMSON, being first duly sworn, says that the investigation which he has made shows the foreign corporate defendants named herein have endeavored to avoid subjecting themselves to the jurisdiction of the courts of the United States by making their sales abroad only and requiring customers to pay in advance for all purchases.

/s/ EDWARD S. STIMSON

(Oath and Seal Omitted.)

100 IN UNITED STATES DISTRICT COURT.

[TITLE OMITTED.]

MOTION FOR PRELIMINARY INJUNCTION—
Filed January 29, 1945.

The United States of America, plaintiff, moves the Court for a preliminary injunction restraining the above named foreign corporate defendants, namely Societe Internationale Forestiere et Miniere du Congo, Companhia de Diamantes de Angola, Societe Miniere du Beceka, Societe Generale de
101 Belgique, De Beers Consolidated Mines, Ltd., Diamond Trading Company, Ltd., Diamond Corporation, Ltd., Consolidated African Selection Trust, Ltd., and Sierra Leone Selection Trust, Ltd., from withdrawing money from banks in the United States and from withdrawing diamonds or other property from safe deposit boxes in the United States and from withdrawing from the United States or selling, transferring or otherwise disposing of property in the United States until such time as this Court shall have determined the issues of this case and defendant corporations shall have complied with its orders.

The injury to the United States of America from the
102 withdrawal of said deposits, diamonds or other property would be irreparable because sequestration of said property is the only means of enforcing this Court's orders or decree against said foreign corporate defendants. The principal business of said defendants is carried on in foreign countries and they could quickly withdraw their assets from the United States and so prevent enforcement of any order or decree which this Court may render.

/s/ HERBERT A. BERMAN

/s/ PATRICK A. GIBSON

/s/ EDWARD S. STIMSON

Special Assistants to the Attorney General
Attorneys for Plaintiff.

In United States District Court. 103

[Title Omitted.]

Modification of Temporary Restraining Order—
Filed January 31, 1945.

This 31st day of January, 1945 the United States of America by its attorney Edward S. Stimson, applied for a modification of the temporary restraining order heretofore granted in this cause on the 29th day of January, 1945, the modification being for the purpose of releasing property on board the ship S. S. Talisman of the Barber Lines, Inc. and on the dock for loading therein belonging to or 104
for shipment to Societe Internationale Forestiere et Miniere du Congo (Forminiere) or Societe Miniere du Beceka (Beceka) and to be used in the mining of diamonds and tin in the Belgian Congo. It is estimated that the value of this property is $14,650 and that $5,000 of the purchase price is yet unpaid and that an additional $2,000 will be required to cover handling, freight and other charges. It is therefore

Ordered that the temporary restraining order heretofore granted in this cause on January 29, 1945 be and the same is modified to permit the removal from the United States of the aforesaid property of Forminiere or Beceka 105
in the S. S. Talisman and on the docks for loading therein and to permit the forwarding to Forminiere or Beceka of the shipping papers relating thereto and that Forminiere or S. H. Ball be permitted to withdraw $7,000 from the account at the Chase National Bank in the name of S. H. Ball, Consulting Geologist, Forminiere for the purpose of completing payment for the aforesaid property and the handling, freight and other charges thereon.

Issued at New York, New York, on this 31st day of January 1945, at 10:15 o'clock A. M.

[Sgd] Vincent L. Leibell
United States District Judge.

106 IN UNITED STATES DISTRICT COURT.

[TITLE OMITTED.]

MODIFICATION OF TEMPORARY RESTRAINING ORDER—
Filed January 31, 1945.

This 31st day of January 1945 the United States of America by its attorney Edward S. Stimson, applied for a modification of the temporary restraining order heretofore granted in this cause on the 29th day of January, 1945, the modification being for the purpose of making it clear that
107 the order does not apply to the funds of persons having notice of the order but only to the funds of the corporate defendants. It is therefore

ORDERED that the temporary restraining order heretofore granted in this cause on January 29, 1945 be and the same is hereby modified by adding the words "belonging to defendants" after the word "money" in line 9, and after the word "property" in lines 10 and 12, all of the first full paragraph on page 2 of said temporary restraining order.

Issued at New York, New York, on this 31st day of January 1945, at 10:15 o'clock A. M.

108 (sgd) VINCENT L. LEIBELL,
United States District Judge.

IN UNITED STATES DISTRICT COURT. 109

[TITLE OMITTED.]

ORDER EXTENDING AND AMENDING TEMPORARY RESTRAINING ORDER—Filed Feburay 6, 1945.

On the second day of February, 1945, at 10:30 o'clock A. M., the motion of the United States of America for a preliminary injunction came on for hearing and Robert T. Swaine, John Wood and James B. Alley made statements as officers of the court as set out in the attached affidavit of Edward S. Stimson and it appearing that there is good cause for postponing the hearing of the motion of the 110
United States for preliminary injunction in that time is needed to communicate with the officers of the foreign corporate defendants, said officers being abroad, and time will be needed by any attorneys whom they may authorize to act for them to prepare for argument of the motion; it is therefore

ORDERED that the temporary restraining order heretofore granted on January 29, 1945 as modified by the two orders signed and filed on January 31, 1945 be amended to read as stated in subsequent paragraphs and as amended be extended to 12 o'clock midnight, February 16, 1945, or to the entry of the order on plaintiff's motion for a preliminary 111
injunction, whichever is sooner, and that the amended and extended order read as follows:

ORDERED that said foreign corporate defendants, namely, Societe Internationale Forestiere et Miniere du Congo, Companhia de Diamantes de Angola, Societe Miniere du Beceka, Societe Generale de Belgique, De Beers Consolidated Mines, Ltd., Diamond Trading Company, Ltd., Diamond Corporation, Ltd., Consolidated African Selection Trust, Ltd., and Sierra Leone Selection Trust, Ltd., each and all of them, their officers, agents, servants, employees and attorneys, and all persons having notice of this order be restrained from withdrawing money belonging to the corporate defendants from banks in the United

112 States and from withdrawing diamonds or other property belonging to the corporate defendants from safe deposit boxes in the United States and from withdrawing from the United States or selling, transferring or otherwise disposing of property belonging to the corporate defendants in the United States, and that all persons having notice of this order be enjoined from assisting said corporate defendants, their officers, agents, servants, employees and attorneys to violate this order; and it is further

ORDERED that this temporary restraining order shall not apply to monies or funds which, after January 29, 1945, are paid or transmitted abroad through banks in the
113 United States for account of or credit to any of the corporate defendants by or on behalf of persons other than the corporate defendants, where such payments or transfers are made for diamonds to be delivered from outside the United States to or for the account of such persons; nor shall this order apply to diamonds so purchased after January 29, 1945; and this temporary restraining order shall not apply to funds sent by the foreign corporate defendants from outside of the United States after January 29, 1945 for the purpose of paying for mining machinery equipment and supplies purchased for shipment abroad, and for expenses incident thereto, nor to the aforesaid
114 mining machinery equipment and supplies purchased with said funds. Any bank through which any payment or transfer is made after January 29, 1945 for credit to or account of any of the corporate defendants by or on behalf of persons other than the corporate defendants and any bank which receives any payment or transfer of funds made on behalf of the corporate defendants from outside the United States after January 29, 1945 for payment or transfer to any person other than the defendants, may assume in the absence of knowledge to the contrary, that this order does not apply to such payment or transfer; and it is further

ORDERED that this restraining order shall be and remain subject to the provisions of the two modifying orders signed and filed on January 31, 1945; and it is further

ORDERED that this restraining order shall expire at 12 Midnight on February 16, 1945 or on the entry of the order on plaintiff's motion for a preliminary injunction, whichever is sooner, unless extended or dissolved by further order of the court; and it is further 115

ORDERED that plaintiff's motion for a preliminary injunction be set down for hearing on the 13th day of February 1945 at 10:30 o'clock A. M.; and it is further

ORDERED that this order be filed forthwith in the office of the Clerk of this Court and entered on record.

Issued at New York, New York, on this 6th day of February 1945 at 10:20 o'clock A. M. 116

/s/ VINCENT L. LEIBELL
United States District Judge

IN UNITED STATES DISTRICT COURT.

[TITLE OMITTED.]

AFFIDAVIT OF EDWARD S. STIMSON—February 5, 1945.

EDWARD S. STIMSON, being first duly sworn, deposes and says that he is a Special Assistant to the Attorney General with headquarters in Washington, D. C, and that at 10:30 o'clock on February 2, 1945 he was present in Judge Vincent L. Leibell's courtroom, Room 506, United States Court House, Foley Square, New York, when the motion of the United States for a preliminary injunction in the above-entitled cause which was noted for hearing at that time was called, and that he heard what took place there, which was as follows: 117

That Herbert A. Berman, Special Assistant to the Attorney General, Washington, D. C., Attorney for the United States of America in the above-entitled cause, answered that the United States was ready to argue for the motion; that Robert T. Swaine of Cravath, Swaine & Moore said that he wished to make a statement as an officer of the court, that he was not authorized to appear for any of

118 the defendants, that he had a cable from South Africa, that he could not say on the basis of this cable that he was authorized to represent De Beers Consolidated Mines, Ltd., Diamond Corporation, Ltd. and Diamond Trading Company, Ltd. that he would probably get instructions and that he needed time to communicate further with South Africa, and that if he were authorized to represent the three corporations he needed time to become acquainted with the case and prepare for argument; that John Wood of Root, Clark, Buckner & Ballantine stated, as an officer of the court that he was not appearing on behalf of any party but that he had been consulted by certain of the
119 individual defendants on whom process had been served as alleged representatives of foreign corporations, that he believed such individual defendants had no authority to retain counsel to represent any of the foreign corporations or to authorize any action on their behalf and that time was needed to communicate to such foreign corporate defendants the facts as to the institution of this action; that James B. Alley, as an officer of the court, stated that he had been consulted by and was representing an individual and a corporation which had been served as alleged agents of Societe Generale de Belgique, that he thought Societe Generale de Belgique was not doing business in this country, that time was needed to communicate with Societe
120 Generale de Belgique in order to ascertain the facts and to prepare for argument.

That Judge Vincent L. Leibell said that it appeared that there was not sufficient time for the foreign corporate defendants to employ counsel and for their counsel to prepare for argument of the motion, that good cause had been shown for postponing the argument on the plaintiff's motion for a preliminary injunction and asked counsel to prepare an order postponing the hearing on the motion for a preliminary injunction to February 13 and extending the temporary restraining order to February 16.

S/ EDWARD S. STIMSON

(Oath and Seal Omitted)

In United States District Court. 121

[Title Omitted.]

Order Continuing Amended Temporary Restraining Order—Filed February 14, 1945.

On the 13th day of February, 1945, at 10:30 o'clock A. M., the motion of the United States of America for a preliminary injunction came on for a hearing and on the application of Edward S. Stimson that the hearing on said motion be postponed until February 23, 1945 at 10:30 A. M., and that the temporary restraining order heretofore granted in this 122
cause be extended to February 26, 1945 at 12 midnight, as set out in the attached affidavit of Edward S. Stimson, and it appearing from said affidavit that there is good cause for postponing the hearing of the motion of the United States for a preliminary injunction in that time is needed to communicate with and receive instructions from the officers of the foreign corporate defendants who are abroad; it is therefore

Ordered, that the amended temporary restraining order issued on February 6, 1945 be extended to 12 o'clock midnight February 26, 1945 or to the entry of the order on plaintiff's motion for a preliminary injunction, whichever 123
is sooner, unless extended or dissolved by further order of this Court; and it is further

Ordered, that plaintiff's motion for a preliminary injunction be set down for hearing on the 23rd day of February, 1945, at 10:30 o'clock A. M.; and it is further

Ordered, that this order be filed forthwith in the office of the Clerk of this Court and entered of record.

Issued at New York, New York, on this 14th day of February, 1945, at 3:15 o'clock P. M.

/s/ Edward A. Conger
U. S. District Judge

124 IN UNITED STATES DISTRICT COURT.

[TITLE OMITTED.]

AFFIDAVIT OF EDWARD S. STIMSON—February 14, 1945.

EDWARD S. STIMSON, being first duly sworn, says that he is a Special Assistant to the Attorney General with headquarters in the Department of Justice Building in Washington, D. C.; that he has conferred with counsel for all of the foreign corporations, that they asked for a postponement of the time for arguing the motion for a preliminary injunction because they needed more time to communicate
125 with and receive instructions from the officers of the foreign corporate defendants who are abroad, that he stated to said counsel that the Government was willing to postpone the time for argument of the preliminary injunction 10 days, provided the temporary restraining order also be extended for the same length of time; that counsel for defendant corporations stated that they had no objection to such an extention of the temporary restraining order; that he was present in Room 506 of the Federal Court House when the plaintiff's motion for a preliminary injunction came on for a hearing before Judge Conger, and that he stated that the hearing of plaintiff's motion was postponed until February
126 23, 1945 at 10:30 A. M., and that the temporary restraining order heretofore granted in this cause be extended to February 26, 1945 at 12 midnight, and that he understood the defendants had no objection; and that counsel for the defendant corporations were present but did not speak.

/s/ EDWARD S. STIMSON
(Oath and seal omitted)

In United States District Court. 127

[Title Omitted.]

Order Extending Amended Temporary Restraining Order—Filed February 26, 1945.

On the 23rd day of February, 1945, at 10:30 o'clock A. M., the motion of the United States of America for a preliminary injunction came on for hearing and counsel for some of the defendant corporations, appearing specially and without waiving defenses as to jurisdiction, stated that they needed additional time to prepare for argument of the motion and asked for an adjournment and 128
counsel for the United States of America consented thereto, and it appearing that there is good cause for postponing the hearing of the motion of the United States for a preliminary injunction in that counsel for some of the defendant corporations need additional time to prepare for argument, it is

Ordered that the amended temporary restraining order issued on February 6, 1945 and extended to February 26, 1945 by an order entered on the 14th day of February, 1945 to be extended to 12 o'clock midnight, March 8, 1945 or to the entry of the order on plaintiff's motion for a 129
preliminary injunction, whichever is sooner, unless extended or dissolved by further order of this court, and it is further

Ordered that plaintiff's motion for a preliminary injunction be set down for hearing on the 2nd day of March, 1945 at 1:30 P. M., and it is further

Ordered that this order be filed forthwith in the Office of the Clerk of this Court and entered on record.

Issued at New York, New York, on this 26th day of February 1945 at 10:30 o'clock A. M.

(Sgd) Samuel Mandelbaum
United States District Judge

130 IN UNITED STATES DISTRICT COURT.

[TITLE OMITTED.]

AFFIDAVIT OF SYDNEY H. BALL—February 28, 1945.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

SYDNEY H. BALL, being first duly sworn, deposes and says:

1. I am a mining engineer and geologist and have ac-
131 tively practiced that profession in New York City since 1909. I am a member of the firm of Rogers, Mayer & Ball, with offices at 26 Beaver Street, New York City. My practice has related not only to diamonds, but also to precious and base metals and non-metallic minerals. I am consulting geologist for the defendant Societe Internationale Forestiere et Miniere du Congo (herein called Forminiere).

2. On information and belief: Forminiere is a Belgian Congo corporation of which 54.6% of the stock is owned and held by the Belgian Congo Government. Forminiere and its affiliated companies are engaged in the business of mining diamonds, tin and other metals in the Belgian Congo.
132 The principal corporate office of Forminiere is and has for many years been at Tshikapa in the Belgian Congo. Prior to the invasion of Belgium in 1940 the chief administrative office of Forminiere was located at Brussels, Belgium. About the time of the invasion, the officials of the Company at Brussels moved their offices and later established them at Tshikapa. The Company now seems to be in the process of transferring its chief administrative office back to Brussels.

3. There are two substantial categories of property of Forminiere which are affected by the temporary restraining order hereinbefore entered in this case and which would be affected by the preliminary injunction which the plaintiff seeks. They are (a) certain funds which were transmitted to the United States for use in the purchase of sup-

plies and equipment for the mines, and (b) property and 133
equipment which had been so purchased but not shipped at the time of the entry of the temporary restraining order. The facts as to such funds and purchases are set forth below.

4. Prior to the invasion of Belgium in May 1940, Forminiere made only occasional purchases in the United States and, on information and belief, purchased in Belgium or other countries in Europe the greater part of the machinery, equipment and supplies required in its operations. Since May 1940, due to war conditions, Forminiere has obtained a substantial part of such machinery, equipment and supplies in the United States. The articles purchased include 134
pumps, concentrating machinery, power shovels, steel and iron pipe, steel chutes, wire, wire cloth, roofing sheets, hand shovels, picks, machetes, axes, hatchets, nails, padlocks, motorcycles and the like.

5. The usual procedure in making such purchases is as follows: Forminiere sends to me a list of urgently needed machinery, equipment and supplies. I then obtain quotations and place orders, and also obtain the necessary export licenses and priority ratings from the United States government. After the goods have been manufactured and delivered and the necessary arrangements are completed, the goods are shipped to the Belgian Congo in accordance 135
with Forminiere's directions. The purchase price and all incidental expenses are paid out of an account which I have at The Chase National Bank of the City of New York in the name of "S. H. Ball, Consulting Geologist, Forminiere." The balance in that account is maintained by deposits which are transmitted to this country from abroad, at irregular intervals, by Forminiere.

6. On January 29, 1945, the date of the first temporary restraining order entered in this case, I had approximately $632,000 on deposit in the above-mentioned account with The Chase National Bank. Since January 29, 1945, I have disbursed approximately $7,000 from said account to complete payment for property exported on the *S. S. Talisman*

136 in accordance with the order entered herein on January 31, 1945. This left a balance remaining in said account of approximately $625,000. I have today been advised that the sum of $16,650 has just been deposited in said account, in satisfaction of a personal commitment which I made in connection with said order of January 31.

7. I now have outstanding firm orders for machinery, equipment and supplies aggregating approximately $235,000. Said orders were placed on or before January 29, 1945. On or before said date I had paid or provided for payment of approximately $45,000 on account of said
137 orders. Said orders are placed with about seventy different manufacturers and suppliers throughout the United States. A part of the machinery, equipment and supplies involved therein has to be specially fabricated. The whole of the machinery, equipment and supplies involved therein is in various stages of manufacture, delivery or storage, but no part has yet been exported.

8. On or before January 29, 1945 I had sent out to suppliers in payment for machinery, equipment and supplies checks aggregating approximately $4,500 which had not yet been cleared at the time notice of the temporary restraining order issued in this suit was served on The Chase
138 National Bank of the City of New York. When said checks were subsequently presented for payment, they were dishonored because of said order.

9. Following issuance of the temporary restraining order herein, I was obliged to notify the various suppliers with whom orders had been placed that the funds which I had intended to use for payment were subject to the restraining order, and that such order restrained me from exporting the goods and from making any payment in connection with them, even for freight, storage and the like. I asked the various suppliers to hold any goods which they might have ready for shipment, pending further instructions. Some of the suppliers have advised me that under the circumstances they felt obliged to suspend work on the orders. Other

suppliers have said that unless payment is completed fairly soon, they may be forced to dispose of the goods to others. 139

10. Prior to January 29, 1945 I had received from Forminiere requests for additional machinery, equipment and supplies on which orders had not yet been placed, estimated at approximately $150,000. All work on the placing of these orders has necessarily been suspended.

11. The order of February 6 entered herein, which purports to exempt from the effect of the first temporary restraining order any additional funds which may be sent to this country by corporate defendants after January 29, 1945 for the purpose of buying mining machinery, equipment and supplies and for expenses incident thereto, has not in fact relieved the situation. On or about February 12, 1945 I caused to be transmitted to Forminiere a request that additional funds be made available for the purposes stated. Thus far no additional funds have been made available for such purposes. In fact I have not yet had any response to such request. In this connection, it is significant that wartime conditions and restrictions make it very difficult to arrange for and obtain the transfer of international credit or even to communicate with Forminiere. For example, upon the institution of this action I sent notice thereof by cablegram to Forminiere at its office at Tshikapa, Belgian Congo, and was informed in reply that the matter would have to be dealt with by the officials in Brussels. As direct communication between Brussels and the Belgian Congo is apparently not possible, the message had to be transmitted through English channels and it was not until February 22, 1945 that Forminiere was able to communicate with counsel in the United States. In these circumstances the privilege of having additional money brought to the United States, which the Anti-Trust Division offers, will not effectively solve the problem of continuing the urgently needed purchases. 140 141

12. The machinery, equipment and supplies which I have been and should now be buying for Forminiere are essential to the operations of the properties of Forminiere

142 and its associated companies. In my opinion, the interruption of such purchases will materially reduce production within a period of not more than three months.

[Signed] SYDNEY H. BALL

(Oath and seal omitted.)

IN UNITED STATES DISTRICT COURT.

[TITLE OMITTED.]

143

AFFIDAVIT OF GEORGE K. STURM—March 1, 1945.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

GEORGE K. STURM, being first duly sworn, deposes and says:

1. I am Secretary to the "owners" or trustees under the Angola Mines Participation Agreement, an unincorporated association organized under the laws of the State of New York. This association owns 240,936 shares of
144 stock of Companhia de Diamantes de Angola (herein called "Diamang") representing 14.78% of the total shares of stock outstanding.

2. On information and belief: Diamang is engaged in the business of mining and selling diamonds produced in Portuguese West Africa. Beginning in 1941, Diamang has obtained in the United States a substantial part of the machinery, equipment and supplies required for the operation of its mines and for personnel. The articles purchased include steel bars, iron pipe, steel sheets, wire rope, wire cloth, steel screens, roofing sheets, shovels, railway track, saws, trucks, conveyor belting, pumps, motorcycles, and the like.

3. The usual procedure which was followed in making purchases of machinery, equipment and supplies in the United States has been as follows: Diamang sends to this country, addressed in my care, a list of urgently needed machinery, equipment and supplies to be purchased. I then obtain quotations and place orders, and also obtain the necessary export licenses and priority ratings. After the goods have been manufactured and delivered and the necessary arrangements are completed, shipment is made to Portuguese West Africa. The purchase price and all incidental expenses are paid by Diamang out of accounts at The Guaranty Trust Company of New York. The balance in the accounts has been maintained by deposits which were transmitted to this country from abroad, at irregular intervals, by Diamang. 145 146

4. On January 29, 1945, the date of the first temporary restraining order entered in this case, Diamang had approximately $101,000 on deposit with The Guaranty Trust Company of New York. Of this amount, approximately $54,000 was deposited in a cash collateral account for the purpose of covering letters of credit issued for the purchase of equipment and supplies and for freight.

5. Diamang now has outstanding firm orders for machinery, equipment and supplies aggregating approximately $81,000, placed on or before January 29, 1945. On or before said date, Diamang has paid, or provided for payment of, approximately $55,000 on account of said orders. Said orders are placed with about thirty different manufacturers and suppliers throughout the United States. Such machinery and supplies are in various stages of manufacture, delivery or storage. 147

6. Prior to January 29, 1945, there had been received from Diamang, requests for additional machinery, equipment and supplies on which orders have not yet been placed, estimated at approximately $45,000. All work on the placing of these orders has necessarily been suspended.

148 7. The machinery, equipment and supplies which Diamang has been and should now be buying in the United States are urgently needed for carrying on its mining operations in Portuguese West Africa.

(sgd.) GEORGE K. STURM

(Oath and seal omitted.)

IN UNITED STATES DISTRICT COURT.

149 [TITLE OMITTED.]

AFFIDAVIT OF JOHN E. F. WOOD—March 2, 1945.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

JOHN E. F. WOOD, being duly sworn, deposes and says:

1. I am a member of the firm of Root, Clark, Buckner & Ballantine, attorneys for the defendants Societe Minjère du Beceka (hereinafter called "Beceka"), Societe Internationale Forestiere et Miniere du Congo (hereinafter
150 called "Forminiere"), and Companhia de Diamantes de Angola (hereinafter called "Diamang"). This affidavit is made in connection with the opposition to the plaintiff's motion on January 29, 1945, for a preliminary injunction.

2. The defendants Beceka, Forminiere and Diamang intend to assert some or all of the defenses enumerated in Rule 12(b) of the Rules of Civil Procedure either by motion or in the answer. Because of the difficulties of communication with the offices of said defendants it has been impossible to prepare for the presentation of such defenses as yet. Indeed, Beceka and Forminiere were not able to appoint counsel in this country until February 22, 1945, and Diamang had been able to do so only a few days prior thereto.

3. The opposition to the plaintiff's motion for pre- 151
liminary injunction is therefore made with the reservation of all grounds of defense to the action and without waiving any such defenses.

JOHN E. F. WOOD

(Oath and Seal Omitted.)

IN UNITED STATES DISTRICT COURT.

[TITLE OMITTED.] 152

ORDER AMENDING AND EXTENDING TEMPORARY RESTRAINING ORDER—Filed March 7, 1945.

On the 2nd day of March 1945 at 1:30 o'clock P. M. the motion of the United States of America for a preliminary injunction came on for hearing and was argued by counsel for the Government and counsel for some of the corporate defendants, appearing specially and without waiving jurisdiction, and the court reserved decision on the motion for a preliminary injunction and ordered that the temporary restraining order be extended; counsel for De Beers Con- 153
solidated Mines, Ltd. asked that the temporary restraining order be modified to permit the continuance of the advertising and publicity campaign and public relations work being carried on in the United States for De Beers Consolidated Mines, Ltd., and counsel for the United States consented thereto and on March 6, 1945 counsel for Societe Forestiere et Miniere du Congo advised counsel for United States that the exception in the previous order did not permit banks to receive funds from abroad after January 29, 1945 from a corporate defendant for deposit to the credit of corporate defendant and thus Societe Forestiere et Miniere du Congo could not deposit funds in its account at The Chase National Bank for use in paying for purchases of machinery equipment and supplies and counsel for the

United States consented to change the order to permit such deposits and payments; it is therefore

ORDERED that the amended temporary restraining order issued on February 6, 1945 and extended by subsequent orders be amended to read as stated in subsequent paragraphs and as amended be and the same is hereby extended to 12 o'clock midnight, March 18, 1945 or to the entry of the order on plaintiff's motion for a preliminary injunction, whichever is sooner, and that the amended and extended order reads as follows:

ORDERED that said foreign corporate defendants, namely, Societe Internationale Forestiere et Miniere du Congo, Companhia de Diamantes de Angola, Societe Miniere du Beceka, Societe Generale de Belgique, De Beers Consolidated Mines, Ltd., Diamond Trading Company, Ltd., Diamond Corporation, Ltd., Consolidated African Selection Trust, Ltd. and Sierra Leone Selection Trust Ltd., each and all of them, their officers, agents, servants, employees and attorneys, and all persons having notice of this order be restrained from withdrawing money belonging to the corporate defendants from banks in the United States and from withdrawing diamonds or other property belonging to the corporate defendants from safe deposit boxes in the United States and from withdrawing from the United States or selling, transferring or otherwise disposing of property belonging to the corporate defendants in the United States; and that all persons having notice of this order be enjoined from assisting said corporate defendants, their officers, agents, servants, employees and attorneys to violate this order; and it is further

ORDERED that this temporary restraining order shall not apply to monies or funds which, after January 29, 1945, are paid or transmitted abroad through banks in the United States for account of or credit to any of the corporate defendants by or on behalf of persons other than the corporate defendants, where such payments or transfers are made for diamonds to be delivered from outside the United States to or for the account of such persons; nor

shall this order apply to diamonds so purchased after January 29, 1945; and this temporary restraining order shall not apply to funds sent by the foreign corporate defendants from outside of the United States after January 29, 1945 nor to mining machinery equipment and supplies purchased for shipment abroad, or expenses incident thereto, paid for out of any of said funds sent from outside the United States after January 29, 1945. Any bank through which any payment or transfer is made after January 29, 1945 for credit to or account of any of the corporate defendants by or on behalf of persons other than the corporate defendants at any bank which receives any payment or transfer of funds made on behalf of the corporate defendants from outside the United States after January 29, 1945 may assume, in the absence of knowledge to the contrary, that this order does not apply to such payment or transfer or any further payment or transfer of such funds; and it is further

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ORDERED that this restraining order shall be and remain subject to the provisions of the two modifying orders signed and filed on January 31, 1945; and it is further

ORDERED that this restraining order shall expire at 12 Midnight on March 18, 1945 or on the entry of the order on plaintiff's motion for a preliminary injunction, whichever is sooner.

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Issued at New York, New York, on this 7th day of March, 1945 at 10:15 o'clock A. M.

/s/ SAMUEL MANDELBAUM
United States District Judge.

160 IN UNITED STATES DISTRICT COURT.

[TITLE OMITTED.]

AFFIDAVIT OF EDWARD S. STIMSON—March 9, 1945.

EDWARD S. STIMSON, being first duly sworn deposes and says that he is a Special Assistant to the Attorney General with headquarters in the Department of Justice Building in Washington, D. C., that with the assistance of others he has made an investigation of the extent and nature of business done in the United States by the foreign corporate defendants and that by this investigation he ascer-
161 tained the following facts:

SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO (FORMINIERE).

Defendant, Forminiere, is a corporation organized under the laws of the Belgian Congo. While the Belgian Government owns stock interest in this company, the stock which it owns has no voting power and the Belgian Government does not direct its management. At the time of filing of the complaint, approximately 50% of the voting stock of this company was owned by the defendant, Albert
162 E. Thiele and Herbert H. Vreeland (the latter now deceased), as trustees under the Congo Mines Participation Agreement. Its principal business consists of mining diamonds and marketing them through the Diamond Trading Company, Ltd., pursuant to the unlawful arrangement alleged in the complaint.

Forminiere is the largest producer of industrial diamonds in the world, producing approximately two-thirds of the world's supply. It has in excess of 16,000 employees. All of its property except as hereinafter stated is located outside the United States; all of its officers with the exceptions hereinafter noted also reside outside of the United States. For many years prior to the date of the filing of the complaint herein and up to the present time, the

business which the defendant Forminiere has conducted in the Southern District of New York has included the following: 163

Since about 1910 two directors of said corporation have continuously resided in the Southern District of New York and have continuously performed their duties as Directors of Forminiere.

Since 1910 to date, Sydney H. Ball has been continuously employed by Forminiere as purchasing agent and consulting geologist. Said Sydney H. Ball maintains offices at 26 Beaver Street; New York, New York, and at said offices has continuously performed most of his duties as consulting geologist of Forminiere. Some of the duties performed by Ball are hereinafter described. 164

Forminiere pays part of the office expenses for the offices maintained by said Ball at 26 Beaver Street. The said Ball, from his offices at 26 Beaver Street, carries on an extensive correspondence on behalf of Forminiere. The stationery which he uses has at the top of its letterhead, in large type, Societe Internationale Forestiere et Miniere du Congo and below that, Sydney H. Ball, Consulting Geologist. A copy of said stationery is attached hereto and made part hereof.

For many years prior to the date of the filing of this complaint Forminiere has continuously maintained bank accounts in the Southern District of New York. Since 1910, Forminiere has continuously maintained an account at The Chase National Bank. This account is in the name of "Sydney H. Ball, Consulting Geologist, Forminiere." 165

Until 1941 the said Ball was authorized by Forminiere to draw on said account by check signed by him. Since 1941, Ball and one of the two American directors of Forminiere were authorized to sign checks on said account.

During the year 1944 the balance maintained by Forminiere in the Chase account ranged from half a million dollars to one million dollars. The account has been a very active one, for example, during the first six months of 1944, approximately 295 checks were drawn on this account.

166 Forminiere also maintained a bank account at the Guaranty Trust Company in the name of "Societe Internationale Forestiere et Miniere du Congo" from May, 1939 to January 4, 1944. The balance varied from $7,000 to $44,000. Originally Whelpley and Vreeland were authorized to draw on the account jointly. Later Ball and Sturm were empowered to draw upon it, using checks countersigned by Vreeland or Whelpley.

Forminiere purchases in this country a large portion of the supplies required to house, feed and shelter its more than 16,000 employees, and substantially all of the equipment, machinery and supplies required for the operation
167 of its mines and mills, the greater part of said supplies and equipment being purchased for Forminiere by the said Sidney H. Ball. Ball receives requests for equipment and supplies from Forminiere, selects the supplier and the supplies and equipment required by Forminiere, makes the purchases and pays for them by drawing checks on the bank account in the Chase National Bank described above.

The current purchases of Forminiere in this country aggregate about a million dollars a year. The scope of Ball's agency in the United States is indicated by the circumstance that most of the substantial contracts of purchase reflected in this figure were consummated here by Ball, and
168 the further circumstance that Ball to procure the release of $16,000 frozen by the temporary restraining order in the instant proceedings, represented that he would cause the directors of Forminiere to replace the funds so released, and that following such representation replenishment of the fund was in fact accomplished.

The purchasing activities conducted by Ball in the Southern District on behalf of Forminiere are frequent and continuous. The type of equipment and supplies purchased and the separate purchases are too voluminous to set forth herein. Some of the typical purchases include the following: aluminum and its alloys; chemicals; copper wire; pipes; sheets; diesel engines; a steam shovel; electrical machinery; equipment and supplies; fuel oil; hardware; household

equipment; hospital supplies; hydraulic pumps; iron bars 169
and rods; car wheels and axles; castings; lathes; motors; paints, oils and varnishes; plates, rails, railroad truck equipment; typewriters; wire fencing; rubber manufactures; wheelbarrows.

Sidney H. Ball as purchasing agent and consulting geologist for Forminiere carries on from his offices at 26 Beaver Street in the Southern District of New York correspondence with the manufacturers and suppliers in order to conclude the voluminous purchases in part enumerated above. The equipment purchased is consigned by manufacturers and suppliers to Ball and inspected and accepted by him in the Southern District of New York. Ball also arranges for the 170
packaging and transportation of the material and supplies to Forminiere in Africa.

In order to export the supplies and equipment purchased by Forminiere, as above described, Forminiere must obtain export licenses from the United States. Moreover, a large part of such supplies and equipment comprise critical items, and in order to obtain such material and supplies, Forminiere must obtain priorities from the War Production Board. Ball, as consulting geologist of Forminiere, carries on extensive negotiations and holds numerous conferences with officials of the United States Government in order to obtain priorities and export licenses. In order to obtain 171
such permits one must satisfy the government officials in charge of the matter as to Forminiere's need for the equipment and supplies and as to its importance to the war effort. Ball, as consulting geologist, prepares applications for licenses and priorities in the Southern District; such applications are signed "Societe Internationale Forestiere et Miniere du Congo, by Sidney H. Ball, Consulting Geologist". The supplies and equipment purchased by Forminiere in the Southern District are essential for the continued operation of Forminiere's mines and mills and without such equipment and without such priorities Forminiere would not be able to conduct its business. Since the outbreak of the European war in 1939, the United States has been the principal source of supply for the material above described.

172 COMPANHIA DE DIAMANTES DE ANGOLA
(DIAMANG)

Defendant, Diamang, is a corporation organized under the laws of Portugal. Its principal business consists of mining diamonds and marketing them through the Diamond Trading Company pursuant to the unlawful arrangement alleged in the complaint in this case. Diamang produces several hundred thousand carets of diamonds annually. All of its property, except as hereinafter stated, is situated outside of the United States; all of its officers with the exception subsequently noted, also reside outside the United States. Continuously and for many years
173 prior to the date of the filing of the complaint in this case and up to the present time, Diamang has transacted business in the United States in the Southern District of New York and the business which the defendant Diamang has so conducted has included the following:

Since before 1915 two directors of said corporation have continuously resided in the Southern District of New York and have continuously performed their duties as directors of Diamang.

Since 1915 and to the date of the filing of the complaint in this case, George K. Sturm has been continuously employed by Diamang as purchasing agent and auditor. Said
174 George K. Sturm maintains offices at 26 Beaver Street, New York, New York and at said offices has continuously performed most of his duties as purchasing agent and auditor of Diamang. Some of the duties performed by Sturm are hereinafter described.

Diamang pays part of the office expenses for the offices maintained by said Sturm at 26 Beaver Street. Sturm, from his office at 26 Beaver Street carries an extensive correspondence on behalf of Diamang. His signature appears on letters at the top of which appear the words COMPANHIA DE DIAMANTES DE ANGOLA and below that, 26 BEAVER STREET. A copy of one of said letters is attached hereto and made a part hereof.

For many years prior to the date of the filing of the complaint in this case Diamang has continuously main-

tained bank accounts in the Southern District of New York. 175
For many years and to the date of the filing of the complaint in this case, Diamang has continuously maintained an account at the Guaranty Trust Company, New York City. This account is in the name of "Companhia de Diamantes de Angola". The balance maintained in this account is in the neighborhood of $100,000. The account could be drawn upon by the joint signatures of any two of the following three persons, Sturm and the two American directors of Diamang. The account has been an active one.

Diamang purchases in this country a large portion of the supplies required to house, feed and shelter its employees, and substantially all of the equipment, machinery 176
and supplies required for the operation of its mines and mills, the greater part of said supplies and equipment being purchased for Diamang by the said George K. Sturm, its purchasing agent and auditor. Sturm receives requests for equipment and supplies from Diamang, selects the supplier and the supplies and equipment required by Diamang, makes the purchases and pays for them by drawing checks on the bank account in the Guaranty Trust Company described above.

The supplies and equipment purchased by Diamang in this country amount to several hundred thousand dollars annually. The purchasing activities conducted by Sturm 177
in the Southern District of New York on behalf of Diamang are frequent and continuous. The type of equipment and supplies purchased and the separate purchases are too voluminous to set forth herein. Some typical purchases are as follows: Wire rope, pumps, motors, wrenches, valve refacing machine, grinding wheels, gauges, inserted tooth saws, surveying compasses, steel shovel blades, belt fasteners, and rubber hose.

George K. Sturm, as purchasing agent and auditor for Diamang, carries on from his office at 26 Beaver Street in the Southern District of New York, correspondence with the manufacturers and suppliers in order to conclude voluminous purchases described above. The equipment purchases are consigned by manufacturers and suppliers

178 to Sturm and inspected and accepted by him in the Southern District of New York. Sturm arranges for the packaging and transportation of the material and supplies to Diamang in Africa. Diamang, in order to export the supplies and equipment purchased by Diamang as above described, must first obtain export licenses from the United States. A large part of such supplies and equipment are critical items and in order to obtain them, Diamang must secure a priority from the War Production Board. Sturm, as purchasing agent and auditor of Diamang, carries on extensive negotiations and holds conferences with officials of the United States Government in order to obtain pri-
179 orities and export licenses. In order to obtain such permits, it is necessary for Sturm to satisfy Government officials as to Diamang's needs for equipment and supplies and of its importance to the war effort. Sturm, as purchasing agent and auditor, prepares applications for licenses and priorities in the Southern District of New York; such applications are signed George K. Sturm, but the application is made on behalf of "Companhia de Diamantes de Angola". Equipment and supplies purchased by Diamang in the Southern District of New York are necessary for the continued operation of Diamang's mines and mills. Without such equipment and priorities Diamang would not be able to conduct its business.

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DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD., DIAMOND TRADING COMPANY, LTD.

Defendant De Beers owns 80% of the capital stock of defendant, the Diamond Corporation, Ltd.; the remaining 20% being owned by the Consolidated Diamond Mines of Southwest Africa, which De Beers controls. Defendants De Beers and Diamond Corporation each own 50% of the stock of the Diamond Trading Company. De Beers controls and manages the activities of the Diamond Corporation and the Diamond Trading Company.

All the officers and employees of De Beers Consolidated Mines, Ltd., Diamond Corporation, Ltd. and Diamond Trading Company, Ltd. reside outside of the United States and

to the knowledge of deponent, all the property belonging 181
to the three corporations, with the exceptions hereinafter set forth, is located in countries outside of the United States.

The Diamond Trading Company controls and markets, pursuant to the unlawful arrangements described in the complaint, 95% of the world's supply of industrial and gem diamonds. The United States is by far the largest market in the world for gem diamonds and approximately 90% of all industrial diamonds sold by the Diamond Trading Company are purchased by brokers and dealers located in the United States.

At the time of the filing of the complaint herein and for 182
many years prior thereto, the three companies, De Beers Consolidated Mines, Ltd., Diamond Corporation, Ltd. and Diamond Trading Company, Ltd. transacted business in the United States and more particularly in the Southern District of New York. The activities of the three companies in the United States include:

For many years prior to the filing of the complaint, the three companies have followed the practice of regularly sending their officers and employees to the United States to transact the business of the three companies.

Among the officers and employees who come to the United States to transact business for the three corporations are Sir Ernest Oppenheimer, Chairman of the Boards 183
of De Beers Consolidated Mines, Ltd., Diamond Corporation, Ltd. and Diamond Trading Company, Harold Thomas Dickinson, Technical Director of De Beers Consolidated Mines, Ltd., Fergus Rogers, Lute J. Parkinson, Assistant General Manager of De Beers Consolidated Mines, Ltd., and Stanley Routley. Such officers and employees have stayed in the United States for various periods of time for the purpose of transacting business for the three companies. The stay of some of these officers or employees extended over periods of months. Harold T. Dickinson spent most of the years 1941 and 1942 in the United States. Parkinson came to the United States in August, 1943 and his stay in this country lasted until February, 1944. While in this country such officers and employees have maintained

184 offices in the Southern District of New York in space furnished either by the N. W. Ayer & Co., 30 Rockefeller Plaza, New York, N. Y. or by the Newmont Mining Co. of 14 Wall Street, New York, N. Y. While such officers and employees were in the Southern District, in addition to directing the advertising and publicity campaign which the three companies carry on in the United States, reported to their home office on the market condition in respect to diamonds in the United States; investigated complaints made by customers of the Diamond Trading Company in the United States; conferred with brokers and dealers of diamonds in order to promote the business and good-will
185 of the three companies; carried on negotiations with officials of the United States Government in respect of selling large amounts of diamonds; participated in wage negotiations carried on by the diamond cutters of the Diamond Makers Protective Union; displayed and sold certain quantities of diamonds to the trade in this country; and carried on other activities in behalf of the three corporations.

De Beers has for many years maintained bank accounts in the Southern District of New York including accounts with the Standard Bank of South Africa, Ltd. of 67 Wall Street, New York, N. Y., Barclay's Bank, 120 Broadway, New York, N. Y. and Chase National Bank, 18 Pine Street,
186 New York, N. Y. in its own name and in the names of employees.

The three companies presently carry on and have for many years carried on an extensive public relations and advertising campaign in the United States designed to increase their sales of diamonds in this country.

De Beers Consolidated Mines, Ltd., Diamond Corporation, Ltd. and Diamond Trading Co. maintained in the New York World's Fair in the year 1939 to 1941 an extensive display of diamonds having a value of approximately eight million dollars. After the World's Fair closed these diamonds were kept for some time in safe deposit boxes maintained by De Beers at the Chase Safe Deposit Co. and Rockefeller Center Bonded Warehouse. Some of these diamonds were released from bond, customs duty paid by

De Beers and sold within the Southern District of New York. 187

De Beers also contributes sums of money to associations such as the Gemological Institute of America, the American Gem Society, Jewelry Industry Publicity Board, to assist in the activities of these associations which foster the sale of diamonds by promotional and publicity work. De Beers financed the publication in the United States of certain books such as "The Story of Diamonds" issued by the Chicago Jewelers' Association and "Famous Diamonds of the World". Both of these books are sold in the United States by the Gemological Institute of America.

De Beers employs the N. W. Ayer & Co., 30 Rockefeller Plaza, New York, N. Y. to assist in its advertising and public relations work in this country. 188

The three companies regularly advertise in leading publications in the United States. This advertising is designed to increase the sale of diamonds by the three companies in this country. As a result of the advertising, their sales have materially increased. Some of the advertisements set forth retail prices of diamonds for the purposes alleged in the complaint, tampering with, fixing and maintaining retail prices of gem diamonds in the United States. In addition to the advertising, N. W. Ayer engages in extensive publicity and public relations campaign in the United States on behalf of De Beers Consolidated Mines, Ltd., the Diamond Trading Company and the Diamond Corporation, Ltd. One of the purposes of the campaign is to discourage, eliminate and counteract publicity unfavorable to or critical of De Beers and its subsidiaries. Another purpose of the publicity campaign is to increase the sales of diamonds in this country and to promote good-will. 189

In addition to the advertising and public relations work referred to above, N. W. Ayer & Son, Inc., performed many services in the United States as agents for De Beers Consolidated Mines, Ltd., Diamond Corporation and Diamond Trading Company, Ltd. It investigates retail prices of diamonds by using shoppers, reports on Government price regulations for diamonds, reports complaints

made by customers of the Diamond Trading Co., investigates the number, wages, hours and union membership of diamond cutters in New York and Philadelphia; supplies office facilities for officers and employees of De Beers while they are in the United States, and receives and forwards mail for them. De Beers Consolidated Mines, Ltd., Diamond Corporation, Ltd. and Diamond Trading Co. have displayed and sold diamonds in the United States following the Worlds Fair.

The three companies displayed the diamonds which they had in this country at the Worlds Fair at the offices of N. W. Ayer for the purpose of securing customers for such diamonds. Officers of De Beers then in the United States sold some of the aforesaid diamonds at offices which the Diamond Trading Company then maintained at 30 Rockefeller Plaza, New York, N. Y. during May and June, 1941.

Harold Thomas Dickinson referred to above, an officer of defendant De Beers Consolidated Mines, Ltd., while in New York in 1941 and 1942 carried on negotiations with officials of the U. S. Treasury for the purpose of selling them large quantities of industrial diamonds and sold several million dollars worth of industrial diamonds. Some of the diamonds so sold were brought by Dickinson to the United States and there shown to officials of the Treasury, and sold by Dickinson to the Treasury Department. All the diamonds purchased by the United States Government were shipped by The Diamond Trading Company to the United States, inspected and payment made by the United States Government after delivery, inspection and acceptance in this country.

On or about September 1942 the Diamond Trading Company contracted to sell four and a half million carats of diamonds to the Metals Reserve Co., 811 Vermont Avenue, N. W., Washington, D. C. The contract provided for payment to the Diamond Trading Co. after the Diamond Trading Co. had shipped the material to New York and after inspection and acceptance of the material by repre-

sentatives of the Metals Reserve Co. in the Southern 193
District of New York.

Subsequently, the U. S. Commercial Co., an agency of the United States, entered into two contracts with the Diamond Trading Company, one on August 9, 1944, of 6,000 carats of industrial diamonds and another in 1943 of 10,000 carats of industrial diamonds. Contracts provided that the diamonds would be delivered by the Diamond Trading Company to the U. S. Commercial Co. at 60 Beaver Street, New York, N. Y. and that payment would be made after arrival of the stones in New York and after inspection and acceptance of the stones by persons designated by U. S. Commercial Co. Approximately eighty per cent of the 194
diamonds delivered under the August 9, 1944 contract were returned to the Diamond Trading Company because they were not satisfactory. Defendants De Beers Consolidated Mines, Ltd., Societe Generale de Belgique and Societe Internationale Forestiere et Miniere du Congo own and control the Banque Diamantaire Anversoise of 630 Fifth Avenue, New York, N. Y. and defendant De Beers Consolidated Mines, Ltd. utilizes such bank as a Credit Department of the Diamond Trading Co. in the United States. The sole business of the Banque Diamantaire consists of the financing of the purchase of diamonds. Approximately 75% of this business consists of financing brokers and dealers 195
located in the United States who wish to purchase diamonds from the Diamond Trading Company. The Diamond Trading Company ships many of the diamonds so financed and purchased by brokers and dealers in the United States to the aforesaid bank for delivery by it to such customers and brokers in the United States.

The Banque Diamantaire also furnishes credit information concerning prospective American purchasers to the Diamond Trading Company and otherwise assists the Diamond Trading Company's operations in the United States.

[Sgd.] EDWARD S. STIMSON

(Oath and Seal omitted.)

(Appendix containing Authorities omitted.)

196 IN UNITED STATES DISTRICT COURT.

[TITLE OMITTED.]

AFFIDAVIT OF JOHN E. F. WOOD—March 13, 1945.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

JOHN E. F. WOOD being first duly sworn says:

1. I am a member of the firm of Root, Clark, Buckner & Ballantine, attorneys for the defendants, Societe Miniere
197 du Beceka (hereinafter called "Beceka"), Societe Internationale Forestiere et Miniere du Congo (hereinafter called "Forminiere") and Companhia de Diamantes de Angola (hereinafter called "Diamang"). This affidavit is made with reference to the affidavit dated March 9, 1945 of Edward S. Stimson, Special Assistant to the Attorney General, setting forth certain alleged facts concerning "the extent and nature of business done in the United States" by Forminiere, Diamang and certain of the other defendants herein.

2. These defendants have appeared specially in oppo-
198 sition to the Government's motion for a preliminary injunction and have expressly reserved all grounds of defense to the action, and more particularly the defenses that this Court has no jurisdiction over the persons of the defendants and that the complaint fails to state a claim upon which relief can be granted. It has also been shown to the Court that by reason of the fact that the defendants Forminiere and Beceka are located in Belgium and in the Belgian Congo and Diamang is located in Portugal and in Portugese West Africa, and by reason of the difficulties and delays of communications with them under war conditions, the obtaining and production of the facts which the Court will require for the proper determination of these defenses will consume a considerable period of time.

3. During the course of the oral argument, the Court 199
suggested that it might be necessary in connection with the motion for a preliminary injunction for the Government to make some showing as to the Court's jurisdiction. The Government's answer to this was that until the defendants had produced facts showing that the Court did not have jurisdiction, the alleged facts contained in the Government's papers should be taken as sufficient for the purpose of the present motion. The argument then proceeded on that basis, and I believe it was the understanding of all parties that the Court in deciding the Government's motion for a preliminary injunction would not deem it necessary to pass upon the jurisdictional 200
questions.

4. If the Court should now undertake to pass these questions, time will have to be given to the defendants to obtain proof of the facts involved. Because of the circumstances already referred to, this will require a considerable period of time. Moreover, the Court has indicated that it might refer these questions to a special master. All of this would unavoidably involve protracted delay. Meanwhile, it would be most unjust to the defendants to keep their property tied up pending a decision of these questions.

201

5. I submit, therefore, that the Court should proceed with the determination of the Government's motion for a preliminary injunction, leaving the questions of jurisdiction to be reserved for separate determination until such time as the facts necessary for such determination can be obtained.

JOHN E. F. WOOD.

(Oath and Seal omitted.)

202 IN UNITED STATES DISTRICT COURT.

[TITLE OMITTED.]

ORDER CONTINUING TEMPORARY RESTRAINING ORDER—
Filed March 16, 1945.

On the 13th day of March, 1945 at 4:00 o'clock P. M. at a conference in Judge Mandelbaum's chambers in the United States Court House, Foley Sq., New York, New York, at which were present Judge Samuel Mandelbaum and counsel for the Government and for each of the corporate defendants, Judge Mandelbaum stated that it would take him some time to decide the Government's motion
203 for a preliminary injunction in the above entitled cause and counsel for the Government then pointed out that the existing temporary restraining order expired on Sunday, March 18, 1945, that it took about three days to renew the temporary restraining order and to serve the 26 banks and asked that the temporary restraining order be continued for an additional 10 days or until the ruling on the Government's motion for a preliminary injunction whichever was sooner, and Judge Mandelbaum stated that he would renew the temporary restraining order; and it appearing that there is good cause for continuing the temporary restrain-
ing order in that the Court needs time to consider and
204 decide the motion for a preliminary injunction; it is therefore

ORDERED that the order issued on March 7th, 1945 amending and extending the temporary restraining order be and the same hereby is extended and continued to 12 o'clock midnight March 28, 1945 or to the entry of the order on plaintiff's motion for a preliminary injunction, whichever is sooner, unless extended or dissolved by further order of this court; and it is further

ORDERED that this order be filed forthwith in the office of the Clerk of this court and entered of record.

Issued at New York, New York on this 16th day of March, 1945 at 10:30 o'clock A. M.

(Sgd) SAMUEL MANDELBAUM,
United States District Judge.

205

IN UNITED STATES DISTRICT COURT.

[TITLE OMITTED.]

EXEMPTION FROM TEMPORARY RESTRAINING ORDER—
Filed March 16, 1945.

On this 16th day of March, 1945, counsel for Companhia de Diamantes de Angola, appearing specially and without waiving objections to jurisdiction, represented to counsel for the Government that the right to hold shipping space reserved on behalf of Companhia de Diamantes de Angola would be lost unless assurances could be given that it would 206
be used, and requested that the machinery, equipment and supplies listed below, which had been paid for, be released from the temporary restraining order so that they can be exported to Companhia de Diamantes de Angola in Africa in said shipping space; and George K. Sturm having promised that he would endeavor to have Companhia de Diamantes de Angola deposit the value of said machinery, equipment and supplies in its bank account at the Guaranty Trust Company to be held subject to said temporary restraining order and that he believed Companhia de Diamantes de Angola would do so; and counsel for the Government consented thereto. The said machinery, equip- 207
ment and supplies, with approximate quantities are as follows:

Paid for by check:	Amount
Saw mill parts	$1,116.16
8,100 lbs. of Electrodes (used for welding)	606.05
3 reels and 7 coils of bare copper wire and cable	662.34
500 ft. of 3" water hose (used for sluicing)	435.00
3,300 ft. of flexible electric cord	53.42
5,000 shovel blades	3,850.00
10 pces. $\frac{3}{8}$" x 8" steel plates	143.35
26 Barcalo and Stillson wrenches 20 Hacksaw Frames	61.22
110 boxes of Belt fasteners	161.84

208	30 pcs. Belt fasteners 90 sets of cutting taps		78.82
	41 pcs. bearings		41.87
	3 surveying compasses		99.90
			$7,309.97
	Paid for under Letters of Credit:		
	33 pcs. of steel sheets	$292.91	
	Milling cutters	456.82	749.73
			$8,059.70

it is therefore

209 ORDERED, that the order issued herein on March 7, 1945, at 10:15 o'clock A. M., as extended by an order issued on the same day as this order, be and the same is modified to permit the removal from the United States of the above mentioned property of Companhia de Diamantes de Angola and to permit the forwarding to Companhia de Diamantes de Angola of all shipping papers relating thereto.

Issued at New York, N. Y., on this 16th day of March, 1945, at 10:30 o'clock A. M.

/S/ SAMUEL MANDELBAUM
United States District Judge

210

211

IN UNITED STATES DISTRICT COURT.

[TITLE OMITTED.]

AFFIDAVIT OF ALBERT E. THIELE—March 23, 1945.

STATE OF GEORGIA,
COUNTY OF GLYNN, } ss.:

ALBERT E. THIELE, being first duly sworn, deposes and says:

1. Copies of the summons and complaint herein were delivered to me on January 31, 1945. I have been told that such delivery was intended to constitute service of process herein upon me (1) as an individual party defendant, (2) as a Director of Societe Internationale Forestiere et Miniere du Congo (hereinafter called "Forminiere"), and (3) as a Director of Companhia de Diamantes de Angola (hereinafter called "Diamang"). I am making this affidavit for the purpose of stating the facts concerning my relation with said corporations. 212

2. As to Forminiere, I am not an officer of that Corporation, nor a managing agent, nor a general agent, and I have not been authorized by appointment or by law to receive service of process on its behalf. I am not authorized to, and I do not perform any of the functions of an officer. I have no authority to make contracts or commitments of any kind on behalf of the Corporation or in any way deal with any of its property, and no authority over any of its officers, employees or agents. 213

3. By letter dated December 6, 1944, the "Owners" under "Congo Mines Participation Agreement" proposed to Forminiere that I be elected a director of Forminiere as successor to Mr. Medley G. B. Whelpley. The "Owners" to whom I have referred were three individuals and a New

York charitable corporation, all of whom were citizens and residents of the United States of America. I am advised and believe that by virtue of participation agreement to which I have referred, the "Owners" are constituted as duly authorized representatives of various persons in the United States of America who have acquired a stock interest in Forminiere and are beneficial owners of approximately twenty-five per cent of the outstanding stock of Forminiere. The "Owners" as such representatives are entitled to nominate two of the members of the Forminiere Board, which now consists of at least eight members.

4. So far as I know, Forminiere has not yet taken any action with respect to the above mentioned proposal, and I am therefore not a director of that Corporation.

5. When I consented that my name be submitted to Forminiere as a candidate for a directorship, it was with the understanding that my function as a director would be solely to obtain information and to keep myself advised concerning the affairs of the Corporation to the extent that I might consider it advisable to do so in the interests of the persons represented by the "Owners", with respect to their investment in the stock of the Corporation. It was understood that my predecessor had not taken, and that I would not be expected to take, any part in the management of the Corporation. It was understood that my position as a director would empower me to attend and to vote at Directors' meetings, but I was not expected actually to attend such meetings in person as they are always held in Belgium, the Belgian Congo or elsewhere abroad, and never in the United States. It was understood that I was not expected to transact any kind of business on behalf of the Corporation in the United States.

6. As to "Diamang", I am not an officer of that Corporation, nor a managing agent, nor a general agent, and I have not been authorized by appointment or by law to receive service of process on its behalf. I have no authority to make contracts or commitments on behalf of the Corpo-

ration and no authority over any of its officers, employees or agents, and I do not perform any of the functions of an officer; and, except as hereinafter stated in paragraph 13, I have no authority to dispose of or in any way deal with any of its property. 217

7. By letter dated December 6, 1944, the "Owners" under "Angola Mines Participation Agreement" proposed to Diamang that I be elected a director of Diamang as successor to Mr. Medley G. B. Whelpley. The Angola "Owners" to whom I have referred in this paragraph were three individuals and a New York charitable corporation, all of whom were citizens and residents of the United States of America. I am advised and believe that by virtue of the Angola Mines Participation Agreement to which I have referred in this paragraph, the Angola "Owners" are constituted as duly authorized representatives of various persons in the United States who have acquired a stock interest in Diamang and are beneficial owners of approximately 14.78 per cent of the outstanding stock of Diamang. The "Owners" as such representatives have regularly nominated two of the members of the Diamang Board which, according to my latest advice, consists of a total of sixteen members. 218

8. Early in February I was notified that at a meeting of the Board of Directors of Diamang held in Lisbon, Portugal, on January 17, 1945, I had been appointed a director of Diamang, subject to Articles 8(2) and 9 of the "Statutes" of Diamang. 219

9. I am advised and believe that Article 8(2) of the "Statutes" of Diamang, properly translated, is as follows:

> "Every elected director must possess 500 Shares of the Company, which shall be deposited in its coffers or placed to its order wherever the Company may direct, and such Shares cannot be returned until after the expiration of the term of office and when the period to which Article 190 of the Commercial Code refers shall have elapsed."

220 I do not possess any of the stock of Diamang. The 500 Shares required by the above quoted provision to qualify me as a director have not yet been provided.

10. I am advised and believe that Article 9 of the "Statutes" of Diamang, properly translated, is as follows:

> "It is within the authority of the Board of Directors, subject to the approval of the first subsequent General Stockholders' meeting to be held, to fill any vacancies in the Board and to take measures for the temporary substitution of any director prevented from fulfilling his duties, by a Shareholder appointed by him and approved by the Board."

221 I am not a Shareholder of Diamang. I am advised and believe that the next General Stockholders' meeting of Diamang will not be held prior to June, 1945.

11. I do not consider that I am a qualified director of Diamang, and I have not purported to act in any way as a director of that Corporation.

12. When I consented that my name be submitted to Diamang as a candidate for a directorship, it was with the understanding that my function as a director would be solely to obtain information and to keep myself advised
222 concerning the affairs of the Corporation to the extent that I might consider it advisable to do so in the interests of the persons represented by the Angola "Owners", with respect to their investment in the stock of the Corporation. It was understood that my predecessor had not taken, and that I would not be expected to take, any part in the management of the Corporation. It was understood that my position as a director would empower me only to attend and to vote at Directors' meetings, and I was not even expected to attend such meetings in person, as they are always held in Portugal or elsewhere abroad, and never in the United States.

13. On or about January 2, 1945, I was authorized by Diamang to sign checks, together with any one of several

other persons, on the account which Diamang has recently 223
maintained with Guaranty Trust Company of New York. The purpose of such account is to finance the purchase in the United States of America of machinery, equipment and supplies. Such purchases are handled by Mr. George K. Sturm, but it has from the beginning been the practice of Diamang to require two signatures for any withdrawal of funds from the bank account, and it was for convenience in this connection that I was authorized to sign.

ALBERT E. THIELE.

(Albert E. Thiele)

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(Oath, Seal and Certificate of County Clerk omitted)

IN UNITED STATES DISTRICT COURT.

[TITLE OMITTED.]

ORDER CONTINUING TEMPORARY RESTRAINING ORDER—Filed March 27, 1945.

At a hearing in this matter before Judge Samuel Mandelbaum on the 21st day of March, 1945, at which were present counsel for the Government and for each of the 225
corporate defendants, Judge Mandelbaum allowed the filing of further affidavits by Tuesday, March 27, 1945, and it appearing that there will not be sufficient time after March 27, 1945 to extend the temporary restraining order which expires March 28, 1945, and it appearing that there is good cause for continuing the temporary restraining order in that there will not be sufficient time after the 27th to extend the same before its expiration on March 28th and in that the Court will need more than one day in which to decide the motion for a preliminary injunction after the aforesaid affidavits are filed; it is therefore

ORDERED that the order issued on March 7, 1945 amending and extending the temporary restraining order, as modified

226 by an order exempting certain property issued March 16, 1945, be, and the same hereby is, extended and continued to 12 o'clock midnight April 7, 1945 or to the entry of the order on plaintiff's motion for a preliminary injunction, whichever is sooner, unless extended or dissolved by further order of this Court; and it is further

ORDERED that this order be filed forthwith in the Office of the Clerk of this Court and entered of record.

Issued at New York, N. Y. on this 27th day of March, 1945 at 11:50 o'clock A. M.

227 /s/ SAMUEL MANDELBAUM,
United States District Judge.

IN UNITED STATES DISTRICT COURT.

[TITLE OMITTED]

AFFIDAVIT OF SYDNEY H. BALL—March 27, 1945.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

228 SYDNEY H. BALL, being first duly sworn, deposes and says:

1. Copies of the summons and complaint herein were delivered to me on January 30, 1945. I am advised that according to the Marshal's return such delivery is claimed to constitute service of process herein upon me as "General Agent and Cashier" of each of the following corporations:

(1) De Beers Consolidated Mines, Ltd.

(2) Diamond Corporation, Ltd.

(3) Diamond Trading Company, Ltd.

(4) Societe Miniere du Beceka (hereinafter called Beceka).

(5) Societe Internationale Forestiere et Miniere du Congo (hereinafter called Forminiere). 229

(6) Companhia de Diamantes de Angola (hereinafter called Diamang).

I have made an affidavit, sworn to March 8, 1945, with reference to De Beers Consolidated Mines, Ltd., Diamond Corporation, Ltd., and Diamond Trading Company, Ltd. I am making this affidavit for the purpose of stating the facts concerning my relations with Beceka, Forminiere and Diamang and such facts as are known to me that may bear on the question whether any of said three corporations are doing business in the United States. 230

As to Beceka.

2. On information and belief, Beceka is a corporation organized under the laws of the Belgian Congo and is the owner of mining properties or concessions situated in the Belgian Congo. I have no personal knowledge of the business or affairs of that Corporation. I have no knowledge or information of any activities of Beceka in the United States, and so far as I know that Corporation has never had any office in the United States or transacted any business in the United States. 231

3. I have no connection whatsoever with Beceka. I am not an officer of Beceka, nor a managing or general agent, nor a cashier, nor a director, and I have not been authorized by appointment or by law to receive service of process in its behalf. I am not authorized to and I do not perform any of the functions of a president, vice-president, treasurer, assistant trea , secretary or assistant secretary of the Corporation.

As to Diamang.

4. On information and belief, Diamang is a Portuguese corporation which owns and operates mining properties in Portuguese West Africa. I refer to the affidavit of George

232 K. Sturm being filed herewith for a statement of the business of that Corporation.

5. I have no connection whatsoever with Diamang. I am not an officer of the Corporation, nor a managing or general agent, nor a cashier, nor a director, and I have not been authorized by appointment or by law to receive service of process on its behalf. I am not authorized to and I do not perform any of the functions of a president, vice-president, treasurer, assistant treasurer, secretary, or assistant secretary of the Corporation.

As to Forminiere.

233 6. On information and belief: Forminiere is a corporation organized under the laws of the Belgian Congo and is engaged in the operation of mines situated in the Belgian Congo. Its products (and those of its subsidiaries) include diamonds, tin, gold and various agricultural products. The entire production of Forminiere and its subsidiaries is sold in Africa or Europe and no sales have ever been made in the United States.

7. In connection with my professional practice as mining engineer and geologist, I have served for a number of years as consulting geologist for Forminiere. As such consulting geologist my duties are to furnish technical advice and 234 information to the Company with respect to its mining problems. For a number of years I have maintained an account with The Chase National Bank in the name of "S. H. Ball, Consulting Geologist, Forminiere", in which relatively small amounts were deposited from time to time and upon which I drew checks to pay my fees and expenses as consulting geologist. I also drew checks on this account to transfer funds, at the request of Forminiere, to the families of American employees at the mines, and to pay for purchases of materials which I was asked to supply to Forminiere from time to time. A statement in the affidavit of Edward S. Stimson, sworn to March 9, 1945, that checks on this account are required to be countersigned by a director of Forminiere, is incorrect.

8. During the present war emergency I have made substantial purchases of mining machinery, equipment and supplies at the request of Forminiere and with funds supplied by it, for shipment to the Belgian Congo. Prior to the invasion of Belgium in May 1940, on information and belief, Forminiere had purchased substantially all of its machinery, equipment and supplies in Europe or Africa and it made only occasional purchases in the United States and in relatively small amounts. Beginning in 1941, however, it was necessary that mining machinery, equipment and supplies be purchased in this country in order to continue and increase the production of industrial diamonds necessary for the war effort. 235 236

9. At the request of Forminiere I have attended to the purchase and shipment of such machinery, equipment and supplies. After receiving from Forminiere a list of needed items I make the purchases in the name of "S. H. Ball, Consulting Geologist, Forminiere" and also obtain United States export licenses and priority ratings upon applications made in the name of "S. H. Ball, Consulting Geologist, Forminiere". The purchase price and all incidental expenses are paid out of the aforesaid account with The Chase National Bank in the name of "S. H. Ball, Consulting Geologist, Forminiere". The balance in that account is maintained by deposits which are transmitted to this country from abroad at irregular intervals by Forminiere. The total price paid for the purchases which I made in the United States as above stated during the period 1941-1944 is as follows: 237

1941	$146,293.78
1942	191,988.93
1943	451,771.11
1944	537,434.24

As compared with these figures the purchases during the preceding ten years had aggregated less than $38,000 for the entire period.

238 10. I am advised and believe that the machinery, equipment and supplies which I have purchased are for use at the mines in the Belgian Congo owned or managed by Forminiere. None of the items were purchased for resale. I exercised no discretion as to what items should be purchased, decisions as to these matters all being taken in the Belgian Congo. I simply placed orders for the items specified by the management of the Corporation.

11. Forminiere has no office in the United States and is not listed in any telephone directory or any office directory. My work as Consulting Geologist is conducted at the offices of my firm, Rogers, Mayer & Ball, which are not in
239 any sense the offices of Forminiere.

12. For my services as Consulting Geologist, Forminiere has regularly paid me a retainer of approximately $7,000 per year, with some additional reimbursement for expenses. Since the middle of 1940 Forminiere has given me extra compensation of $2,000 per year on account of the special purchasing services conducted during the war period. There is no contract covering this extra compensation and the amount is determined by the Corporation in each year. Similarly the allowance for expenses has been increased during the war period. The annual allowance for expenses
240 has fluctuated from approximately $1,000 in 1938 to $8,500 in 1944.

13. In the affidavit of Edward S. Stinson, sworn to March 9, 1945, it is asserted as an instance of my authority in Forminiere that I undertook to cause the directors of Forminiere to replace certain funds in the United States and that such replacement was in fact accomplished. This is an unfair and incorrect statement. When the first temporary restraining order was entered in this case certain machinery, equipment and supplies were being loaded on a ship which was to sail within a few days and I understood that these items were urgently needed for the continued production at the mines in the Belgian Congo. Accordingly I requested representatives of the Anti-Trust Division, in-

cluding Mr. Stimson, to permit the goods to be shipped notwithstanding the temporary restraining order. These representatives asked whether I would undertake to have the value of the shipment, estimated at some $16,000, replaced by the transmission of new funds. In a letter to the Government attorneys dated January 30, 1945, written at their request in connection with this episode, I stated that I would "request and strongly recommend" that Forminiere replace the amount of $16,000. I certainly did not intend to have this statement construed as a representation on my part that I had authority to bind Forminiere in this respect, as in fact I had no such authority. 241

14. I am not an officer of Forminiere, nor a managing or a general agent, nor a cashier, nor a director, and I have not been authorized by appointment or by law to receive service of process on its behalf. I have no authority over any of its officers, employees or agents. 242

I am not authorized to, and I do not, perform any of the functions of an officer of the Corporation, and except as hereinabove stated, I have no authority to make contracts or commitments of any kind on its behalf and no authority to dispose of or deal in any way with any of its funds or property.

243

(Sgd) SYDNEY H. BALL

(Oath and seal omitted.)

244 IN UNITED STATES DISTRICT COURT.

[TITLE OMITTED.]

AFFIDAVIT OF GEORGE K. STURM—March 27, 1945.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

GEORGE K. STURM, being first duly sworn, deposes and says:

1. I reside in Wood-Ridge, Bergen County, New Jersey.

245 2. Copies of the summons and complaint herein were delivered to me on January 30, 1945. I have been informed that according to the Marshal's return such delivery is claimed to constitute service of process herein upon me (1) as an individual party defendant, (2) as "General Agent Cashier" of Societe Miniere du Beceka (hereinafter called "Beceka"), (3) as "General Agent and Cashier" of Societe Internationale Forestiere et Miniere du Congo (hereinafter called "Forminiere"), and (4) as "General Agent and Cashier" of Companhia de Diamantes de Angola (hereinafter called "Diamang"). I am making this affidavit for the purpose of stating the facts con-
246 cerning my relations with said corporations and the facts known to me which may bear on the question whether any of said corporations is doing business in the United States.

AS TO BECEKA.

3. I have no connection whatsoever with Beceka. I am not an officer of the Corporation, nor a managing or general agent, nor a cashier, nor a director, and I have not been authorized by appointment or by law to receive service of process on its behalf. I am not authorized to, and I do no perform any of the functions of a president, vice-president, treasurer, assistant treasurer, secretary or assistant secretary of the Corporation. I have no authority to make contracts or commitments of any kind on

behalf of the Corporation, no authority to dispose of or 247
in any way deal with any of its funds or property, and no authority over any of its officers, employees or agents.

AS TO FORMINIERE.

4. On information and belief: Forminiere is a corporation organized under the laws of the Belgian Congo and is engaged in mining operations solely in the Belgian Congo. Its products are sold entirely in Africa or Europe and it has never sold anything in the United States or for shipment to the United States. It has no office in the United States and derives no income from United States sources. 248

5. I am not a managing or general agent of Forminiere, nor a cashier, nor a director, and I have not been authorized by appointment or by law to receive service of process on its behalf. I am not authorized to, and I do not, perform any of the functions of a president, vice-president, treasurer, assistant treasurer, secretary or assistant secretary of the Corporation. I have no authority to make contracts or commitments of any kind on behalf of the Corporation, no authority to dispose of or in any way deal with any of its funds or property, and no authority over any of its officers, employees or agents. 249

6. I am Secretary to the "Owners" under the "Congo Mines Participation Agreement". They are the duly constituted representatives of an American group which holds as an investment 25% of the stock of Forminiere.

7. I am informed and believe that the "Congo Mines Participation Agreement" was entered into under date of February 1, 1907, between Thomas F. Ryan, Daniel Guggenheim and Morton Trust Company (since succeeded by Guaranty Trust Company of New York); that Messrs. Ryan and Guggenheim had previously subscribed to 25% of the stock of Forminiere; and that the purpose of the Participation Agreement was to allow others to participate in that investment. Certain persons, called "Owners", are

250 authorized by the Agreement to exercise on behalf of those beneficially interested all the rights of owners in respect of the stock held under the Agreement. Provision is made for four "Owners", and in recent years the "Owners" have usually appointed attorneys-in-fact to act for them under general powers of attorney. Albert E. Thiele has been such an attorney-in-fact for two of the "Owners" since December, 1944. Herbert H. Vreeland, who died on January 31, 1945, had been for some time prior to his death as "Owner" and an attorney-in-fact for the fourth "Owner".

8. I am informed and believe that Forminiere has
251 320,000 shares of stock outstanding; that the Government of the Colony of Belgian Congo owns at least 174,800 shares, or 54.6%; that the stock so owned has full voting rights; and that the Colony of Belgian Congo therefore holds a controlling interest. 80,000 shares, or 25% of the total outstanding, are held under the Congo Mines Participation Agreement. I am informed and believe that the balance of the stock is owned by Belgian corporations or individuals.

9. As Secretary to the Congo "Owners", my duties are to keep their books, sign checks on the account of the "Owners", prepare and sign tax returns of the "Owners",
252 translate and summarize minutes and other documents received from Forminiere, prepare resumes of technical and annual reports, handle all correspondence, and generally attend to all of their affairs as "Owners". For these services, I receive a compensation at the rate of $2,238 per year, of which $1,038 is paid by the "Owners" and $1,200 is paid by Forminiere under an arrangement between Forminiere and the "Owners" by which Forminiere makes such payments as its contribution toward the work which I do for the "Owners". The "Owners" also pay $300 per year toward my office rent. Forminiere does not pay any part of the rent of my office.

10. I have for some years been a member of the College des Commissaires of Forminiere, having been so elected as

the nominee of the "Owners". There has long been an 253
understanding between the "Owners" and the Government of what is now the Belgian Congo, to the effect that the "Owners" are entitled to one representative on the College des Commissaires. The College des Commissaires is a group of six individuals who act as a kind of visiting committee on behalf of stockholders and who are privileged to examine all books and records of the Corporation and to submit reports to the stockholders. Under the "Statutes" of Forminiere, the books and records of the Corporation are available to the Commissaires only at the administrative office of the Corporation. Normally the administrative office is located at Brussels, Belgium. It has been in the 254
Belgian Congo during the war. It has never seemed desirable that I should incur the expense of traveling to the administrative office for that purpose, and I have therefore never taken any action as a Commissaire. The compensation I have received as a Commissaire during the past four years has averaged approximately $20 per year. Before the present war, I also received additional compensation, depending on the net profits of the Corporation, averaging approximately $1,500 per year.

11. On or about September 22, 1941, I was authorized by Forminiere to sign, together with another authorized person, checks drawn on an account maintained at the 255
Guaranty Trust Company of New York by Forminiere. This account was opened on May 16, 1939 as a precaution against the risks of the war, which was then threatening. The account was closed January 4, 1944. Since that time I have no authority to sign checks on any bank account of Forminiere.

As to Diamang.

12. On information and belief: Diamang is a corporation organized under the laws of Portugal and is engaged in the business of mining diamonds in Portuguese West Africa. It sells all of its products in Africa or Europe and has never sold anything in the United States or for ship-

ment to the United States. The corporation has no office in the United States and derives no income from United States sources.

13. I am not an officer of Diamang, nor a managing or general agent, nor a cashier, nor a director, and I have not been authorized by appointment or by law to receive service of process on its behalf. I have no authority over any of its officers, employees or agents. I am not authorized to, and I do not, perform any of the functions of a president, vice-president, treasurer, assistant treasurer, secretary or assistant secretary of the Corporation. Except as stated hereinafter in paragraph 21, I have no authority to make contracts or commitments of any kind on its behalf and no authority to dispose of or deal in any way with any of its funds or property.

14. I am Secretary to the "Owners" under the "Angola Mines Participation Agreement". They are the duly constituted representatives of an American group which holds as an investment 14.78% of the stock of Diamang.

15. I am informed and believe that the "Angola Mines Participation Agreement" was entered into under date of May 1, 1913, between Thomas F. Ryan, Daniel Guggenheim and Guaranty Trust Company of New York. Under that Agreement the "Owners" hold 14.78% of the stock of Diamang, the purpose of the Agreement being to allow others to participate in that investment. The "Owners" are authorized by the Agreement to exercise on behalf of those beneficially interested all the rights of owners in respect of the stock held under the Agreement. Provision is made for four "Owners" and in recent years the "Owners" have generally appointed attorney-in-fact to act for them under general powers of attorney. Albert E. Thiele has been an attorney-in-fact for two of the "Owners" since December, 1944. Herbert H. Vreeland, who died on January 31, 1945, had been for some time prior to his death an attorney-in-fact for the other two "Owners".

16. I am informed and believe that Diamang now has 259
a total of 1,630,000 shares outstanding. The Angola "Owners" hold 240,936 shares, or 14.78% of the total amount outstanding. I am informed and believe that the other 85.22% is held by Portuguese, Belgian, English, and perhaps also French, interests. In consideration of granting the original concession, and an exemption from certain taxes, the Government of Portuguese West Africa received 5% of the stock of Diamang and a 40% participation in its profits, which participation in profits was subsequently increased to 50%.

17. As Secretary to the Angola "Owners", my duties are to keep their books, sign checks on the account of the 260
"Owners", prepare and sign tax returns of the "Owners", translate and summarize minutes and other documents received from Diamang, prepare resumes of technical and annual reports, handle all correspondence, and generally attend to all of their affairs as "Owners". For these services I receive a compensation at the rate of $2,538 per year, of which $1,038 is paid by the "Owners" and $1,500 is paid by Diamang under an arrangement between Diamang and the "Owners" by which Diamang makes such payments as its contribution toward the work which I do for the "Owners". The "Owners" also pay $300 per year toward my office rent. Diamang does not pay any part of 261
the rent of my office.

18. On or about October 17, 1940 Diamang opened an account with Guaranty Trust Company of New York. So far as I know, Diamang had no bank account in the United States prior to that time. I am advised and believe that Diamang established the above-mentioned account with Guaranty Trust Company of New York at least in part for the purpose of holding part of its funds in a currency other than the pound and the escudo, and at a place where the deposit would be comparatively free from the risks of war. The account was later used for the purpose of financing the purchases mentioned in paragraphs 20 and 21 below.

19. Two signatures are required for any withdrawal of funds from the above-mentioned account with Guaranty

262 Trust Company of New York. I am one of the persons so authorized, having been given such authority because of my position as Secretary to the "Owners" under the Angola Mines Participation Agreement. Mr. Albert E. Thiele has also been authorized to sign since about January 1, 1945, having been given such authority because of his position as attorney-in-fact for two of the "Owners". Mr. Vreeland held such authority prior to his death.

20. I am advised and believe that in normal times Diamang purchases practically all of its machinery, equipment and supplies in Portuguese West Africa, Portugal and other European countries. Early in 1941 Mr. H. T. Dickin-
263 son, a technical councillor of Diamang, came to this country with the object of arranging for the purchase here of certain machinery, equipment and supplies which Diamang was finding it difficult to obtain elsewhere, because of the war. Diamang asked the Angola "Owners" to give Mr. Dickinson such assistance as they could. At their request, I assisted him in arranging letters of credit and in obtaining priorities, export and Federal Reserve Bank licenses. During the calendar year 1941 Mr. Dickinson bought and paid for approximately $24,000 worth of property, payment being arranged from the Diamang account with Guaranty Trust Company of New York.

264 21. Mr. Dickinson left this country early in 1942. Since his departure I have been instrumental in handling purchases on behalf of Diamang in three different ways. A substantial part of the orders which Mr. Dickinson had placed while he was here have not yet been delivered. On these orders, and at the request of the "Owners", I attended to payment and to shipment. From time to time Diamang has requested the "Owners" to place orders on its behalf. At their request, I have placed the orders, attended to payment and to shipment. In December, 1943, and in January, 1944, I received from the Portuguese Purchasing and Trade Commission two batches of orders which had apparently been signed by the Field Manager of Diamang in Portuguese West Africa and which I was told

had been delivered by him to a representative of the United States Government in Portuguese West Africa, who forwarded it to the United States Government at Washington which, in turn, forwarded it to the Portuguese Purchasing and Trade Commission. After consulting the "Owners", I dispatched a cable to Diamang at Lisbon inquiring what Diamang wished to have done with respect to these orders and, at its request, I followed the same procedure with respect to them as I had with respect to the requests which Diamang had been making of the "Owners". The total purchase price paid in the years 1942, 1943 and 1944 on the orders placed by Mr. Dickinson or by me, including the orders which came through Washington, has been approximately as follows: 265 266

1942	$ 15,000
1943	26,000
1944	127,000

22. Diamang has continued to purchase some machinery, equipment and supplies in the United States by correspondence sent directly from Lisbon to independent brokers or suppliers. The goods so purchased are paid for from the account of Diamang with Guaranty Trust Company of New York.

23. For the work I have done in connection with purchases as above mentioned, I have received from Diamang a special remuneration of $500 for the year 1941, $500 for the year 1942, $1,000 for the year 1943, and $2,000 for the year 1944. There has never been any agreement or understanding in advance with respect to such compensation. Actually the remuneration for 1941 was not received until August 18, 1942. There is no understanding or agreement with respect to compensation for the year 1945. 267

24. To the best of my knowledge, information and belief: Diamang has no property in the United States, except a credit balance with Guaranty Trust Company of New York, as mentioned in paragraph 18 above, and such machinery, equipment and supplies as may have been pur-

268 chased for Diamang but not yet shipped; all of the machinery, equipment and supplies which I have been instrumental in buying for Diamang was purchased for use in connection with its mining operations in Portuguese West Africa; none of such machinery, equipment and supplies are purchased for resale.

(Sgd) GEORGE K. STURM.

(Oath and Seal omitted.)

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269 IN UNITED STATES DISTRICT COURT.

[TITLE OMITTED.]

AFFIDAVIT OF LUCIUS W. MAYER—March 27, 1945.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

LUCIUS W. MAYER, being first duly sworn, deposes and says:

270 1. I am a member of the firm of Rogers, Mayer & Ball with offices at 26 Beaver Street, New York City.

2. Copies of the summons and complaint herein were delivered to me on January 30, 1945. I have been informed that according to the Marshal's return such delivery is claimed to constitute service of process herein upon Rogers, Mayer & Ball as "General Agent and Cashier" of each of the following: (1) De Beers Consolidated Mines, Ltd., (2) Diamond Corporation, Ltd., (3) Diamond Trading Company, Ltd., (4) Societe Miniere du Beceka (hereinafter called "Beceka"), (5) Societe Internationale Forestiere et Miniere du Congo (hereinafter called "Forminiere"), and (6) Companhia de Diamantes de Angola (hereinafter called "Diamang"). I am making this affidavit for the purpose

of stating the facts concerning the relations of Rogers, Mayer & Ball with Beceka, Forminiere and Diamang. 271

3. I have read a copy of the affidavit herein by Sydney H. Ball, sworn to March 27, 1945. Except as stated in said affidavit, neither the firm of Rogers, Mayer & Ball nor any member thereof has any connection whatsoever with Beceka, Forminiere or Diamang.

(Sgd.) Lucius W. Mayer

(Oath and Seal Omitted.)

In United States District Court. 272

[Title Omitted.]

Affidavit of John E. F. Wood—March 27, 1945.

State of New York, }
County of New York, } ss.:

John E. F. Wood, being duly sworn, deposes and says:

1. I am a member of the firm of Root, Clark, Buckner & Ballantine, attorneys appearing specially in this case for the corporate defendants Societe Miniere du Beceka (hereinafter called Beceka), Societe Internationale Forestiere et Miniere du Congo (hereinafter called Forminiere), and Companhia de Diamantes de Angola (hereinafter called Diamang). This affidavit is submitted with reference to the affidavit of Edward S. Stimson sworn to March 9, 1945. 273

2. As was stated in my affidavit sworn to March 13, 1945, the plaintiff's motion for a preliminary injunction against transfer of assets of the corporate defendants was brought on before the defendants had had an opportunity to prepare for motions to dismiss the complaint on the ground that the corporate defendants were not subject to the jurisdiction of the court. Our opposition to the motion on behalf of the defendants above named was made without prejudice

274 to the question of jurisdiction over the parties and we expressly reserved our right to bring on appropriate motions raising that question.

3. Although the said affidavit of Edward S. Stimson sworn to March 9, 1945 makes certain allegations on the question of "doing business", Mr. Stimson has taken the position on behalf of the plaintiff at hearings in this matter held on March 13 and March 21 that the question of jurisdiction over the parties is not now before the Court and that the decision upon the pending motion need not involve that question. I concur with this view of counsel for the plaintiff but since counsel's affidavit remains on file we cannot
275 permit it to go unchallenged, and certain affidavits are being submitted herewith in order to correct certain of the errors of fact in Mr. Stimson's affidavit and erroneous implications which might be drawn therefrom.

4. If the Court determines that it is necessary to pass upon the question of jurisdiction over the parties in connection with the pending motion, then I respectfully ask an opportunity to be heard upon that question. The issue is one of great importance and the facts and law should be carefully argued and briefed before any decision is reached. It would be most unfair to the defendants to have this basic issue decided as a mere incident to other matters with-
276 out the careful presentation which the importance of the issue merits. If, on the other hand, the Court comes to the conclusion that the question of jurisdiction over the parties may be reserved for later decision, then I shall respectfully ask that any order entered on the pending motion shall expressly be made without prejudice to the question of jurisdiction over the parties.

5. For the convenience of the Court I shall summarize in this affidavit the position of the three corporate defendants above named, my statements being made on information and belief based upon my investigation of the case and upon the affidavits of Albert E. Thiele, Sydney H. Ball, George K. Sturm and Lucius W. Mayer being submitted herewith.

BECEKA. 277

6. Beceka is a corporation organized under the laws of the Belgian Congo. It holds mining properties or concessions in the Belgian Congo, the products of which are sold exclusively in Africa or Europe. It has never sold anything in the United States or for shipment to the United States. Its offices are located abroad and it has no office in the United States. None of the persons claimed to have been served as a representative of this corporation has any connection with it of any kind. On these facts the contention that Beceka is doing business in the United States or has any representative in the United States is without merit. 278

DIAMANG.

7. Diamang is a Portuguese corporation operating mining properties in Portuguese West Africa. Its products are sold entirely in Africa or Europe and it has never sold anything in the United States or for shipment to the United States. It has no office in the United States and derives no income from United States sources.

8. One of the grounds on which it is alleged that Diamang is doing business in the United States is that it has certain stockholders here. Approximately 15% of the stock of Diamang is held by Americans under an agreement 279 known as the "Angola Mines Participation Agreement". Under this agreement, to which Diamang is not a party, certain individuals are constituted "Owners" of stock of Diamang and American investors have become entitled to participate in the beneficial ownership of the shares held by the "Owners". Such ownership by Americans of stock in a foreign corporation clearly does not bring that corporation within the United States for purposes of service of process.

9. By reason of American investments in Diamang two of the members of its Board of Directors (consisting of about 17 members) are Americans. These directors perform no executive or administrative function. They are merely entitled to attend directors' meetings, which are all

held abroad and to exercise their voting rights at such meetings. The place of residence of directors is not significant in determining where the corporation does business; the important question is where the Board of Directors functions and on this question the answer is clear that the Board functions only in Portugal.

10. The plaintiff further relies upon the fact that Diamang has caused purchases of supplies and equipment for its mines to be made in the United States, but this does not constitute doing business in the United States for purposes of service of process. Before the war Diamang purchased substantially all its machinery, equipment and supplies in foreign countries and made only occasional purchases in the United States and in limited amounts. Beginning in 1941 it was necessary that such machinery, equipment and supplies be procured in the United States because the sources of supply in Europe were overrun. In order to meet this emergency, Diamang arranged to have necessary purchases made by George K. Sturm who as Secretary to the "Owners" was known to the Corporation. The management of the Corporation in Lisbon informs Sturm as to just what is needed and provides the funds with which the purchases may be made. Every item so purchased is intended solely for use at the mines in Africa and none of it is intended for resale or is resold. It is well settled that the mere purchase of equipment and supplies within the United States does not constitute doing business here for purposes of service of process and I submit that this is particularly true where the great bulk of the purchases is made here not in the ordinary course of business, but rather because of unusual and temporary war conditions.

FORMINIERE.

11. Forminiere is a corporation formed under the laws of the Belgian Congo which operates mining properties in that colony. Its products are sold entirely in Africa or Europe and it has never sold anything in the United States or for shipment to the United States. It has no office in the

United States and derives no income from United States sources. 283

12. Although a majority of the voting stock of Forminiere is owned by the Government of the Belgian Congo, some point is made of the fact that 25% of the stock is held by Americans under an agreement known as the "Congo Mines Participation Agreement". The Corporation is not a party to this agreement and under it certain individuals are constituted "Owners" of stock of Forminiere and American investors have become entitled to participate in the beneficial ownership of the shares held by the "Owners".

13. As in the case of Diamang, the American stockholders are represented on the Board of Forminiere by two directors who perform no executive or administrative function. The directors' meetings are all held in Belgium or the Belgian Congo. 284

14. For a number of years Forminiere has retained Sydney H. Ball, a mining engineer and geologist, to ast as Consulting Geologist. His professional activities consist of advice upon technical problems in connection with the exploitation and operation of the mines. It is submitted that the retention of such a professional expert for consulting services does not bring the corporation within the United States. 285

15. The supplies which are purchased in the United States are intended solely for use in the operation of mines owned or managed by Forminiere and are not purchased for resale. The normal practice of Forminiere is to purchase substantially all its machinery, equipment and supplies in foreign countries. Because of war conditions it became necessary in 1941 and thereafter to purchase the greater part of these requirements in the United States. The purchases are made by Sydney H. Ball, Consulting Geologist, Forminiere. Even if the present value of purchases were normal, it would not constitute doing business under recognized principles. This is especially the case by reason of the fact that the present volume of purchases in

286 the United States results from the unusual emergency with which the Corporation has been faced since 1941, which has caused a dislocation of its business and temporary departure from its normal procedures.

(Sgd.) JOHN E. F. WOOD

(Oath and Seal Omitted.)

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

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287 C. 29-446.

UNITED STATES OF AMERICA, Plaintiff,

against

DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD., DIAMOND TRADING COMPANY, LTD., SOCIETE GENERALE DE BELGIQUE, SOCIETE MINIERE DU BECEKA, SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO, COMPANHIA DE DIAMANTES DE ANGOLA, CONSOLIDATED AFRICAN SELECTION TRUST, LTD., SIERRA LEONE SELECTION TRUST, LTD., RUSSELL JOHNSON PARKER, LUTE J. PARKINSON, HERBERT H. VREELAND, ALBERT E. THIELE, SOLOMON R. GUGGENHEIM, CLENDENIN J. RYAN and GEORGE K. STURM, De-
288 fendants.

Appearances:

Wendell Berge, Esq., Assistant Attorney General; Herbert A. Berman, Patrick A. Gibson and Edward S. Stimson, Esqs., Special Assistants to the Attorney General, Attorney for Plaintiff.

Cravath, Swaine & Moore, Esqs., Attorneys for De Beers Consolidated Mines, Ltd., Diamond Corporation, Ltd., Diamond Trading Company, Ltd.; Robert T. Swaine, Bruce Bromley, Wm. Dwight Whitney, Jack W. Robbins, Esqs., of Counsel.

Root, Clark, Buckner & Ballantine, Esqs., Attorneys 289
for Defendants, Societe Internationale Forestiere et Miniere du Congo and Companhia de Diamantes de Angola; John E. F. Wood, Esq., of Counsel.

Hooker, Alley & Duncan, Esqs., Attorneys for Defendant, Societe Generale du Belgique, appearing specially; James B. Alley, Esq., of Counsel.

OPINION—March 28, 1945.

MANDELBAUM, D. J.:

The complaint in this action brought by the Government 290
charges the corporate defendants and certain individuals with engaging in an unlawful combination and conspiracy restraining foreign commerce in this country in industrial and gem diamonds, in violation of the Sherman Anti-Trust and the Wilson Tariff Acts. The complaint seeks injunctive relief to prevent the continuation of the illegal practices charged. It is alleged that as one of the results of the conspiracy, the United States Government has been prevented from accumulating a stockpile of industrial diamonds in this country for military purposes.

At the time of the filing of the complaint, the court signed a restraining order temporarily enjoining the corporate 291
defendants from withdrawing their assets in banks and from otherwise disposing of property belonging to the corporate defendants in the United States.

The Government is now moving for a temporary injunction to replace the restraining order pending the determination of the issues in this case.

The main question before this Court is whether or not the court has the power to issue the injunction prayed for. In my opinion, this Court clearly has the power to issue the injunction both under the Judicial Code and under Sec. 4 of the Sherman Act. The Judicial Code (28 U. S. C. A. Sec. 377) authorizes the United States Courts "to issue all writs not specifically provided for by statute which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law". Sec. 4 of the

292 Sherman Act (15 U. S. C. A.) expressly provides that "before final decree, the Court may, at any time make temporary restraining order or prohibition as shall be deemed just in the premises". So much for the power of the Court to issue the injunction.

Having come to the conclusion that this Court has the power, the next problem which presents itself is whether or not this Court in the exercise of its discretion should issue the preliminary injunction on the facts before it on this motion.

The defendants are all foreign corporations. None of the defendants have filed answers to the complaint. I am
293 convinced from the facts appearing in the verified complaint and the affidavits in support of and in opposition to this motion that if the injunction does not issue, the assets of the corporate defendants will in all probability be withdrawn from this country. In that event, if the Government should succeed in establishing its cause, there would be no way to enforce the decree of the Court.

The resulting damage to the Government, if I were to deny this motion, is incomparably greater than any damage to the corporate defendants if I were to grant the motion.

Equity will take necessary steps to protect its jurisdiction, where, as here, there is a great probability that the
294 enforcement of its decrees will otherwise be frustrated.

During the course of argument, the question was raised by counsel of whether the Court should deal with the problem of the defendants' doing business here, as ancillary to the question of the preliminary injunction. I am not passing upon the defendants' doing business, because in my opinion, that question is not before the Court on the instant motion.

The motion is granted. Settle order on notice.

FINDINGS OF FACT.

1. The facts alleged in the verified complaint are adopted by the Court and incorporated herein as findings of fact for purposes of this motion only.

CONCLUSIONS OF LAW. 295

1. This Court has the power to grant the preliminary injunction prayed for under Sec. 4 of the Sherman Act and Sec. 377 of Title 28 U. S. C. A.

2. This Court in the exercise of its discretion grants the motion for a preliminary injunction.

Dated, March 28th, 1945.

SAMUEL MANDELBAUM,
U. S. D. J.

296

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

CIVIL No. 29-446.

UNITED STATES OF AMERICA,

Plaintiff,

against

DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD., DIAMOND TRADING COMPANY, LTD., SOCIETE GENERALE DE BELGIQUE, SOCIETE MINIERE DU BECEKA, SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO, COMPANHIA DE DIAMANTES DE ANGOLA, CONSOLIDATED AFRICAN SELECTION TRUST, LTD., SIERRA LEONE SELECTION TRUST, LTD., RUSSELL JOHNSON PARKER, LUTE J. PARKINSON, HERBERT H. VREELAND, ALBERT E. THIELE, SOLOMON R. GUGGENHEIM, CLENDENIN J. RYAN and GEORGE K. STURM, 297

Defendants.

PRELIMINARY INJUNCTION—Filed April 3, 1945.

On the 2nd day of March 1945, there came on for hearing the motion of plaintiff, United States of America, for a preliminary injunction restraining the foreign corporate

298 defendants and after reading the verified complaint and the affidavits submitted by plaintiff and defendants and hearing argument and duly considering the same (but without considering the question whether the foreign corporate defendants are doing business in the United States, which question is not before the Court on this motion, and without prejudice to the rights of the foreign corporate defendants to have such question and the question of the sufficiency of service of process determined later), this Court, for the purposes of this motion only, adopts and incorporates herein as findings of fact the facts alleged in said complaint and upon said complaint and said affidavits finds
299 as facts: that defendants are foreign corporations and they could quickly withdraw their assets from the United States before the entry of a final decree in this cause; that if the preliminary injunction were denied, they would in all probability do so, in which event, if the Government should succeed in establishing its cause, there would be no way to enforce the decree of the Court; and that the resulting damage to the Government would be incomparably greater than any damage to the corporate defendants if the preliminary injunction were granted; and this Court concludes as a matter of law that under Section 4 of the Sherman Act and Section 377 of Title 28 U. S. C. A. the Court has power to issue a pre-
300 liminary injunction in the terms of the order which follows and that the Court should and does hereby exercise its discretion so to do and it is therefore, on motion of the pliantiff,

Ordered that the foreign corporate defendants, namely, Societe Internationale Forestiere et Miniere du Congo, Companhia de Diamantes de Angola, Societe Miniere du Beceka, Societe Generale de Belgique, De Beers Consolidated Mines, Ltd., Diamond Trading Company, Ltd., Diamond Corporation, Ltd., Consolidated African Selection Trust, Ltd., and Sierra Leone Selection Trust, Ltd., each and all of them, their officers, agents, servants, employees and attorneys and all persons having notice of this order be enjoined from withdrawing money belonging to the corporate defendants from banks in the United States and from withdrawing diamonds or other property belonging to

the corporate defendants from safe deposit boxes in the United States and from withdrawing from the United States or selling, transferring or otherwise disposing of property belonging to the corporate defendants in the United States until this case has been finally determined and said foreign corporate defendants have complied with all orders and decrees which may be or have been rendered against them in this cause and that all persons having notice of this order be enjoined from assisting said corporate defendants, their officers, agents, servants, employees and attorneys to violate this order; and it is further 301

ORDERED that this preliminary injunction shall not apply to monies or funds which, after January 29, 1945, are paid or transmitted abroad through banks in the United States for account of or credit to any of the corporate defendants by or on behalf of persons other than the corporate defendants, where such payments or transfers are made for diamonds to be delivered from outside the United States to or for the account of such persons; nor shall this order apply to diamonds so purchased after January 29, 1945; and this preliminary injunction shall not apply to funds sent by the foreign corporate defendants from outside of the United States after January 29, 1945 nor to mining machinery equipment and supplies purchased for shipment abroad, or expenses incident thereto, paid for out of any of said funds sent from outside the United States after January 29, 1945. Any bank through which any payment or transfer is made after January 29, 1945 for credit to or account of any of the corporate defendants by or on behalf of persons other than the corporate defendants and any bank which receives any payment or transfer of funds made on behalf of the corporate defendants from outside the United States after January 29, 1945 may assume, in the absence of knowledge to the contrary, that this order does not apply to such payment or transfer or any further payment or transfer of such funds; and it is further 302 303

ORDERED that this preliminary injunction shall be and remain subject to the provisions of the two orders signed

304 and filed on January 31, 1945, modifying the temporary restraining order signed and filed on January 29, 1945 and the order of March 16, 1945 exempting certain property from the temporary restraining order; and it is further

ORDERED that this order be filed forthwith in the office of the Clerk of this Court and entered on record.

Issued at New York, New York, on this 3rd day of April, 1945 at 1:30 o'clock P. M.

SAMUEL MANDELBAUM,
United States District Judge.

305

IN UNITED STATES DISTRICT COURT.

[TITLE OMITTED.]

MOTION FOR LEAVE TO TAKE DEPOSITIONS BEFORE ANSWER—
Filed April 3, 1945.

The United States of America moves the court for an order granting it leave to take the depositions of the officers and employees of the corporations having knowledge of the facts desired as set out below and of individuals, both
306 as listed below, for the purposes of discovery or for use as evidence in this action or for both purposes on the ground that their testimony is desired for use on the motion of De Beers Consolidated Mines, Ltd., Diamond Corporation, Ltd. and Diamond Trading Company to dismiss the action for want of jurisdiction over their persons and to quash the service of summons, for use on the same issues which the other foreign corporate defendants intend to raise, all as set forth in the supporting Affidavit of Edward S. Stimson attached hereto and filed herewith.

The United States of America moves the court that the order granting leave to take these depositions authorize it to issue subpoenas requiring the production of documentary evidence as follows: all correspondence and contracts with any of the defendants and all printed material,

advertisements, inter-office memoranda, memoranda and notations bearing upon or tending to show the doing of business or any activity by the foreign corporate defendants in the United States. The individuals whom and the corporations the personnel of which the Government desires to take depositions are as follows: 307

RUSSELL JOHNSON PARKER
120 Broadway
New York, N. Y.

ALBERT E. THIELE
120 Broadway
New York, N. Y.

GEORGE K. STURM
26 Beaver Street
New York, N. Y. 308

SYDNEY H. BALL
26 Beaver Street
New York, N. Y.

ROGERS, MAYER & BALL
26 Beaver Street
New York, N. Y.

NEWMONT MINING COMPANY
14 Wall Street
New York, N. Y. 309

AMERICAN METALS CO., LTD.
61 Broadway
New York, N. Y.

N. W. AYER & SON, INC.
30 Rockefeller Plaza
New York, N. Y.

MEDLEY C. B. WHELPLEY
120 Broadway
New York, N. Y.

BANQUE DIAMANTAIRE ANVERSOISE, S. A.
630 Fifth Avenue
New York, N. Y.

310 CHASE NATIONAL BANK
18 Pine Street
New York, N. Y.

CHASE NATIONAL BANK
11 Broad Street
New York, N. Y.

GUARANTY TRUST COMPANY, OF NEW YORK
140 Broadway
New York, N. Y.

STANDARD BANK OF SOUTH AFRICA, LTD.
67 Wall Street
311 New York, N. Y.

PIERRE CATTIER
10 Pearl Street
New York, N. Y.

GILBERT PERRIER
10 Pearl Street
New York, N. Y.

EMILE HEYRMAN
10 Pearl Street
New York, N. Y.

312 ATLANTIC OVERSEAS CORPORATION
10 Pearl Street
New York, N. Y.

INTERNATIONAL SALES CORPORATION
500 Fifth Avenue
New York, N. Y.

s/ EDWARD S. STIMSON

EDWARD S. STIMSON
Special Assistant to the Attorney General
Attorney for the Plaintiff

In United States District Court. 313

[Title Omitted.]

Affidavit of Edward S. Stimson—March 21, 1945.

State of New York }
County of New York } ss.:

Edward S. Stimson, being first duly sworn, deposes and says that he is a Special Assistant to the Attorney General with headquarters in Washington, D. C.; that he is one of counsel for the United States of America in the above entitled cause; that the complaint in the above en- 314
titled cause was filed on January 29, 1945; that a copy of the summons and complaint in this action was personally served on the individual defendants in the Southern District of New York as follows: Russell Johnson Parker, 31st day of January 1945, Albert E. Thiele, 31st day of January 1945; and George K. Sturm, 30th day of January 1945; that a copy of the summons and complaint was served on Solomon R. Guggenheim on the 17th day of February 1945, by delivering copies of the same to a responsible person at his residence, Trillora Court, Port Washington, New York; that a copy of the summons and complaint in this action was served on each of the foreign corporate defendants in the 315
Southern District of New York between January 30 and February 1, 1945 inclusive; that none of the defendants have filed an answer and that the only pleading filed by any of the defendants is a motion to dismiss for lack of jurisdiction over the person of defendant and to quash the service of summons filed by De Beers Consolidated Mines, Ltd., Diamond Corporation Ltd., and Diamond Trading Company on the 23rd day of February 1945; that counsel for Societe Generale de Belgique has objected to government counsel interviewing persons connected with corporations and individuals served with process as agents of Societe Generale de Belgique and that Government counsel has not felt free to interview any of the persons or corporations by their officers and employees who were

316 served with process as agents, cashiers or directors of the foreign corporate defendants; that meanwhile counsel for the defendant foreign corporations are busily engaged in interviewing these persons connected with corporations and individuals served as agents, cashiers and directors; that although an extension of one month to move, plead or answer was consented to by counsel for the Government, counsel for the foreign corporate defendants in a conference before Judge Samuel Mandelbaum on the 13th day of March 1945, urged that they needed additional time to secure affidavits on the question of doing business in the United States from abroad thus clearly indicating that
317 all of the foreign corporate defendants intend to raise the issue of jurisdiction over their persons.

s/ EDWARD S. STIMSON

(Oath and Seal Omitted.)

318

In United States District Court. 319

[Title Omitted.]

Motion for Stay—Denied April 3, 1945.

The defendants, Societe Internationale Forestiere et Miniere du Congo, Companhia de Diamantes de Angola, and Societe Miniere du Beceka, in the above-entitled action respectfully represent to this Court that they are preparing a petition to the Supreme Court of the United States for a writ of certiorari to review the order of this Court granting a preliminary injunction against the transfer or disposition 320
of the assets of the corporate defendants. This petition will be presented at the earliest possible time and will be prosecuted with diligence. The petition is made in good faith and in the belief that it is meritorious.

Wherefore, the said defendants respectfully move this Court to stay the operation of said order and all proceedings herein relating to said preliminary injunction, until said petition for certiorari shall have been passed upon by the Supreme Court of the United States and until final determination of the matter in the event that said petition be granted.

321

Dated, New York, April 3, 1945.

Root, Clark, Buckner & Ballantine,
Attorneys for Societe Internationale,
Forestiere et Miniere du Congo,
Companhia de Diamantes de Angola,
Societe Miniere du Beceka.

By John E. F. Wood,
A Member of the Firm.

Motion denied. Samuel Mandelbaum, April 3, 1945.

322 CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, } ss.:

I, GEORGE J. H. FOLLMER, Clerk of the District Court of the United States for the Southern District of New York, do certify that the foregoing is a true copy of papers on file in the said District Court of the United States in the therein entitled cause, as the same remain upon the records and files of the said District Court of the United States, and that this certification is made at the request of the attorneys for the petitioners for use in the Supreme Court of the
323 United States on an application for a writ of certiorari.

IN TESTIMONY WHEREOF, I hereto set my hand and affix the seal of the said District Court of the United States for the Southern District of New York, at the United States Court House, New York, this 5th day of April, A. D. 1945.

GEORGE J. H. FOLLMER
CLERK OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

324 [SEAL]

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 23, 1945

The petition herein for a writ of certiorari to the District Court of the United States for the Southern District of New York is granted. The case is transferred to the summary docket and assigned for argument immediately following Nos. 1016 and 1017. Counsel are requested to discuss in their briefs and upon oral argument the question whether the order of the District Court may appropriately be reviewed at the present stage of the proceedings by a writ of certiorari under section 262 of the Judicial Code.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FILED
APR 23 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 1189

DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD. AND DIAMOND TRADING COMPANY, LTD.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUHERN DISTRICT OF NEW YORK AND MOTION FOR LEAVE TO FILE

ROBERT T. SWAINE,
WM. DWIGHT WHITNEY,
Counsel for Petitioners,
15 Broad Street,
New York, N. Y.

April 5, 1945.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD. and DIAMOND TRADING COMPANY, LTD.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI.

Now comes WM. DWIGHT WHITNEY, counsel for petitioners above-named, appearing specially herein for the purpose of this motion and reserving all rights under the motion now pending in the District Court of the United States for the Southern District of New York to quash the purported service of process upon them and to dismiss the complaint against them upon the ground that said Court has no jurisdiction over the persons of any of them, and respectfully moves this Court for leave to file the petition for writ of certiorari, hereto annexed, under §262 of the Judicial Code (28 U. S. C. sec. 377), directed to the District Court of the United States for the Southern District of New York, to review an order of that Court, entered

April 3, 1945, more particularly described in the petition, and for such other and further relief as may be just and proper.

WM. DWIGHT WHITNEY,
Counsel for Petitioners,
15 Broad Street,
New York, N. Y.

April 5, 1945.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD. and DIAMOND TRADING COMPANY, LTD.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners above-named, appearing specially herein for the purpose of this petition and reserving all rights under a motion now pending in the District Court of the United States for the Southern District of New York to quash the purported service of process upon them and to dismiss the complaint against them upon the ground that said Court has no jurisdiction over the persons of any of them, respectfully pray for a writ of certiorari to the District Court of the United States for the Southern District of New York to review an order of that Court entered

April 3, 1945, granting respondent's motion for preliminary injunction. A transcript of the record in this case is furnished herewith in accordance with Rule 38, par. 1 of the Rules of this Court.

STATEMENT

The learned District Judge has entered an order entitled "Preliminary Injunction" (R. 171), which however is in substance solely a sequestration of the bank account of petitioner De Beers in a New York bank, amounting to $59,320. The order does not purport to enjoin the petitioners from any restraint of trade or other action cognizable under the Sherman or Wilson Acts. It was sought by the government as a "sequestration" (R. 29) and was granted as such.

The Court's opinion and conclusions of law purport to find power to grant the order under § 4 of the Sherman Act *and* under the same section of the Judicial Code upon which this Petition for Writ of Certiorari is based,—§ 262, 28 U. S. C. § 377. The opinion states (R. 168):

> "that if the injunction does not issue, the assets of the corporate defendants will in all probability be withdrawn from this country. In that event, if the government should succeed in establishing its cause, there would be no way to enforce the decree of the court."

The cause which the government is seeking to establish is one in which the petitioners are charged with the wrong of *not* doing business within the United States.

In form, it is a suit in equity under §§ 1 and 2 of the Sherman Anti-Trust Act (Act of July 2, 1890, c. 647, 26 Stat. 209, 15 U. S. C. §§ 1 and 2) and § 73 of the Wilson

Tariff Act (Act of Aug. 27, 1894, c. 349, 28 Stat. 509, as amended by Act of Feb. 12, 1913, c. 40, 37 Stat. 667, 15 U. S. C. § 8).

The government's complaint, verified by Edward S. Stimson, Esq., Special Assistant to the Attorney General on January 27, 1945, was filed on January 29, 1945, against the petitioners (all South African corporations) and six other foreign corporations and seven individuals. None of the individuals is alleged to, or does, have any connection with the petitioners, except that one Parkinson is alleged to be an officer of De Beers. This is denied,[1] and in any event Parkinson has not been served. The other individual defendants are alleged to have some connection with various corporate defendants other than the three petitioners herein.

The entire subject-matter of the action has to do with the diamond industry in Africa and in England. The theory of the complaint is that the defendants have engaged in an unlawful combination with the intent of restraining diamond imports into the United States. The case falls within the field of the law considered by this Court in *American Banana Company* v. *United Fruit Company*, 213 U. S. 347, and *United States* v. *Sisal Sales Corporation*, 274 U. S. 268. Petitioners are advised that the case clearly falls within the doctrine of the *Banana* case and outside the doctrine of the *Sisal Sales* case.

The allegations of fact in the record before the District Court are found in the verified complaint, in an additional affidavit for the government verified by the same Special Assistant to the Attorney General who verified the complaint (R. 66), and in ten affidavits verified by residents of

[1]Denials are found in the affidavits filed on behalf of petitioners.

the United States on behalf of the petitioners (R. 85 *et seq.*).

A temporary restraining order was granted *ex parte* to the government on January 29, 1945, and was forthwith served upon a number of banks. Admittedly too sweeping in its terms, it was modified in successive restraining orders issued at ten day intervals and in the eventual order for preliminary injunction (sequestration). During the intervening two months counsel were retained by cable for petitioners and appeared specially to question jurisdiction and to contest the injunction. Counsel communicated by cable and letter with their clients in England and South Africa and received cable responses; but under war-time conditions affecting the mail there was no time to receive affidavits or other documents or correspondence from the clients (R. 131).

The affidavits for the petitioners served a three-fold purpose:

(1) To prove that there was no jurisdiction in the Southern District of New York or anywhere in the United States over the persons of the petitioners,

(2) To show that allegations of the complaint, possibly material, were erroneous in fact, and,

(3) To show that there was no ground upon which to support the preliminary injunction, assuming that as a matter of law the District Court had power to grant an injunction (a sequestration) of the character granted.

In effect, the position taken by the petitioners before the District Court was that (1) the injunction must be denied

because the action was unfounded both (a) because the Court lacked jurisdiction over the persons of the defendants-petitioners and (b) because the complaint, perhaps on its face and in any event when read together with the defendants' affidavits, exhibited a case of too dubious a character to support any preliminary injunction, and (2) that the preliminary injunction in itself exceeded the Court's power, as it was not an injunction of the nature provided for under the anti-trust laws.

The facts upon which there is no substantial dispute, and which establish the general subject-matter of the case, are:

(1) That the first two petitioners (De Beers and Diamond Corporation) are engaged in the Union of South Africa in mining and/or purchasing from other miners raw uncut diamonds, and are required to sell their diamonds exclusively through a pool established by statute of the Union of South Africa.

(2) That the petitioner Diamond Trading Company, Ltd., also a South African company, is engaged in selling raw uncut diamonds in London.

(3) That the other corporate defendants either are, or own stock in, diamond mining companies operating in Africa, the products of which companies are also sold in their raw uncut form in London by the petitioner Diamond Trading Company, Ltd.

(4) That none of such corporations conducts a regular business of exporting into the United States

or selling within the United States.[2] Purchasers desiring to have stones cut and polished for the American market and to sell in America purchase the raw uncut diamonds from the petitioner Diamond Trading Company, Ltd in London.

(5) That the trade alleged to be restrained is the import and sale (by others than the defendants) of diamonds (principally industrial diamonds) in the United States.

We must assume upon this petition that the agreements in the Union of South Africa and in the United Kingdom are such as would, if they were made and existed in the United States, be violative of the Sherman Act. It is precisely because the parties to those agreements are not present within the United States and do not do business here that the government has sought a sequestration of their property here, upon the ground that otherwise they will have no reason to consent to the jurisdiction of the United States courts and no reason to accept extra-territoriality

[2] DeBeers made a single sale in the United States in 1940—of the jewels exhibited by it at the New York World's Fair (R. 128). Diamond Corporation made a single sale in the United States—to, and at the request of, the Procurement Division of the United States Treasury Department (R. 128). Diamond Trading Company has made no sales in the United States, but has made three sales in London to, and at the request of, United States Government Agencies (to the Treasury Department in 1941, to Metals Reserve Company in 1942 and to United States Commercial Company, a subsidiary of Reconstruction Finance Corporation, in 1944 (R. 129). These last four sales were all in connection with the war effort, as was the deposit of a stock pile of diamonds made in Canada pursuant to treaty between the governments of the United States, Canada, and of the United Kingdom (R. 137).

for United States law. This is recognized in the order of the District Court where, in the paragraphs next after the one already quoted, it says:

> "The resulting damage to the government, if I were to deny this motion, is incomparably greater than any damage to the corporate defendants if I were to grant the motion.
>
> "Equity will take necessary steps to protect its jurisdiction where, as here, there is a great probability that the enforcement of its decrees will otherwise be frustrated."

JURISDICTION TO REVIEW

The date of the order of the District Court for the Southern District of New York sought to be reviewed was April 3, 1945.

Jurisdiction of this Court is invoked under Judicial Code §262 (36 Stat. 1162, 28 U. S. C. §377).

This Court has exclusive appellate jurisdiction in equity suits by the Attorney General under the Sherman anti-trust law.[3] Judicial Code §238 (28 U. S. C. §345). Expediting Act of Feb. 11, 1903, c. 544, 32 Stat. 823, as amended by Act of June 25, 1910, c. 428, 36 Stat. 854 (15 U. S. C. §29). These statutes read:

> "Sec. 238. A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts, and not otherwise:

[3]Petitioners have, however, *ex majore cautela*, filed a notice of appeal in the 2nd Circuit Court of Appeals, under §129 of the Judicial Code, Act of March 3, 1891, c. 517, 26 Stat. 828; 28 U. S. C. §227.

(1) Section 2 of the Act of February 11, 1903, 'to expedite the hearing and determination' of certain suits brought by the United States under the antitrust or interstate commerce laws, and so forth."

Expediting Act, §2 (15 U. S. C. §28).

"Sec. 2. In every suit in equity pending or hereafter brought in any district court of United States under any of said Acts, wherein the United States is complainant, including cases submitted but not yet decided, an appeal from the final decree of the district court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof: *Provided*, That in any case where an appeal may have been taken from the final decree of a district court to the circuit court of appeals before this Act takes effect, the case shall proceed to a final decree therein, and an appeal may be taken from such decree to the Supreme Court in the manner now provided by law."

This Court has said that under these statutes no appeal from an interlocutory order lies to the Circuit Court of Appeals. *United States* v. *California Co-Operative Canneries*, 279 U. S. 553, 558-9. The question as to the exercise of a discretionary power to entertain the petition without prior hearing in a Circuit Court of Appeals, which divided this Court in *Ex Parte Peru*, 318 U. S. 578, is absent here.

This Court granted on March 5, 1945, petitions in Nos. 1016 and 1017, *United States Alkali Export Association, Inc.* v. *United States*, and *California Alkali Export Association* v. *United States*, requesting however that counsel "discuss in their briefs and upon oral argument the question whether the order of the District Court may appropri-

ately be reviewed at the present stage of the proceeding of the writ of certiorari under §262 of the Judicial Code." There are present in this case features which were absent in Nos. 1016 and 1017, as follows:

(1) Actual sequestration of property of the petitioner De Beers, for which a petition under §262 is the only available form of appellate relief.

(2) An order entered below under purported authority of §262 itself, and therefore falling within the class of orders which the Solicitor General conceded (in his brief in opposition to grant of the writ in Nos. 1016 and 1017) to provide a characteristic occasion on which this Court had granted the writ. His brief read at p. 6:

> "* * * We summarize immediately below the circumstances under which this Court has issued certiorari under that Section [262]. Certiorari has thus issued * * * (4) to review the action of circuit courts of appeals with respect to the issuance of writs under Section 262 itself;" citing *Whitney v. Dick*, 202 U. S. 132, and *McClellan v. Carland*, 217 U. S. 268.

In view of the actual present and continuing injury to the petitioners consequent upon the order of the District Court, it is submitted that the question is an urgent one entitled to preference. This consideration might be satisfied in a manner convenient to the Court if the writ be granted and the case be set for argument immediately following Nos. 1016 and 1017.

We are aware that other defendants (known as Forminiere and Diamang) are filing a similar petition. This case and their case has its own particular facts, presented independently upon different affidavits.

Counsel for the petitioners in these two cases took a differing view in the District Court as to the questions before that Court for decision. Our view was not accepted by the learned District Judge, whose rejection of it is expressed in the concluding paragraph of his opinion (the paragraph next following the three already quoted):

> "During the course of argument, the question was raised by counsel of whether the court should deal with the problem of the defendants' doing business here, as ancillary to the question of the preliminary injunction. I am not passing upon the defendants' doing business, because in my opinion, that question is not before the court on the instant motion."

And also in the order itself:

> "* * * After reading the verified complaint and the affidavits submitted by plaintiff and defendants and hearing argument and duly considering the same (but *without considering the question whether the foreign corporate defendants are doing business in the United States, which question is not before the Court on this motion*, and without prejudice to the rights of the foreign corporate defendants to have such question and the question of the sufficiency of service of process determined later), *this Court, for the purposes of this motion only, adopts and incorporates herein as findings of fact the facts alleged in said complaint* and upon said complaint and said affidavits finds as facts * * *". [Emphasis ours].

The opinion of the learned District Judge was dated March 28, 1945 (R. 170), but the defendants' affidavits answering the Stimson Affidavit which was dated March

9, 1945) had only been filed with the District Court within the last days immediately preceding the Judge's decision of the motion and obviously, in view of the brevity of his opinion and his view that the "question" of jurisdiction was not before him, did not command his objective attention.

The other defendants who are petitioning here took the view throughout the proceedings below that the record was insufficient to permit the Court to pass upon the question whether the defendants were doing business in the United States. What we submitted, was that assuming *arguendo* that the preliminary injunction (sequestration) order was otherwise proper as such, nevertheless the Court, upon its attention being called to the questions whether jurisdiction had been obtained over the persons of the defendants and whether the complaint stated facts sufficient to state a cause of action, could not grant the preliminary injunction without also considering the record before it upon those issues and satisfying itself that there was no insuperable objection to the order on either of those alternative grounds.

QUESTIONS PRESENTED

(1) Whether in a suit in equity by the Attorney General seeking an injunction against alleged violation of §§1 and 2 of the Sherman Anti-Trust Act and §73 of the Wilson Tariff Act, the District Court has power to grant a preliminary order enjoining the defendants.

(a) From withdrawing money belonging to them from banks.

(b) From withdrawing any property owned by them from the United States,

(c) From selling, transferring or otherwise disposing of property belonging to them in the United States,

and enjoining all persons having notice of the order from assisting any of them to violate such order.

(2) Whether in such a suit the District Court has power under Judicial Code §262 (28 U. S. C. §377) to issue a writ having the effect of sequestering property of a defendant until the case shall have been determined.

(3) Whether in such a case the District Court abused its discretion in basing its findings only upon the facts as alleged in the complaint and in an affidavit verified by a Special Assistant to the Attorney General, when there were before the Court other detailed affidavits from persons in a position to have closer knowledge of the facts than the Special Assistant to the Attorney General and refuting the material statements in the complaint and in his affidavit.

(4) Whether in such a case and under such circumstances the Court may fulfill its duty to make findings of fact by adopting and incorporating as its Findings of Fact the allegations in such complaint and affidavit.

(5) Whether in such a case the District Court abused its discretion in granting such a preliminary injunction solely on the ground that the defendants are corporations of nations other than the United States of America and could

quickly withdraw their assets from the United States before the entry of a final decree in the cause and if the preliminary injunction were denied would in all probability do so, in which event if the government should succeed in establishing its cause there would be no way of enforcing the decree of the Court.

(6) Whether in such a case the District Court may refuse to consider the question raised by counsel for the defendants of whether upon the record before the Court the claim that defendants were doing business in the District or in the United States of America was sufficiently rebutted so as to constitute an insuperable obstacle to the grant of such a preliminary injunction.

(7) Whether upon the record before the Court the claim that defendants were doing business in the District or in the United States of America was sufficiently rebutted so as to constitute an insuperable obstacle to the grant of such a preliminary injunction.

(8) Whether even upon the face of the government affidavits the petitioners could be held to have been "found" within the United States.

(9) Whether even upon the face of the government affidavits the petitioners could be held to have been served with process within the United States.

(10) Whether upon the record before the Court the material allegations of the complaint were not sufficiently rebutted so as to constitute an insuperable obstacle to the grant of such a preliminary injunction.

(11) Whether the complaint states a claim entitling the government to relief.

(12) Whether the Courts of the United States should decline jurisdiction of the case under the principles of territoriality recognized in the law of nations and applied by this Court.

REASONS FOR GRANTING THE WRIT

1. Damage to the Petitioner De Beers is real and immediate.

$59,320 belonging to De Beers, a company organized under the laws of the Province of the Cape of Good Hope, Union of South Africa, and having its sole business there, has been sequestered in a bank account in New York, so that the money is unavailable to it pending the determination of this case. Indeed, on the theory of the Court's order, which followed the theory of the government's request for the order, this money is in effect expropriated from De Beers unless De Beers consents to a jurisdiction which does not otherwise exist.

2. The sequestration of the funds is without and support in law.

This is a civil action in equity. Property may not be seized in advance of judgment except under the terms of Rule 64 F.R.C.P. Under Rule 64 such remedy is available only under the circumstances and in the manner provided by the law of the State in which the District Court is held. Under the law of the State of New York there is no right to seize property in advance of judgment in an equity case. New York Civil Practice Act §902. 7 Carmody, New York Practice §309. *Thornington* v. *Merwick*, 101 N. Y. 5.

This seizure was made immediately upon the filing of the complaint (verified only by a government attorney) and was made without notice to the petitioners,—indeed before the petitioners knew of the existence of the litigation. This was done on the theory that it would deprive the Court of jurisdiction if the petitioners were to withdraw the funds from the United States. In other words, it was sought to obtain jurisdiction through the seizure, or alternatively to force the petitioners (as a practical matter) to consent to the jurisdiction in order to obtain release of their funds from the seizure.

3. It is settled law that a sequestration is not a remedy available under the antitrust laws.

This is settled law in this Court. *Paine Lumber Co.* v. *Neal*, 244 U. S. 459. *Geddes* v. *Anaconda Copper Mining Co.*, 254 U. S. 590. *Wilder Mfg. Co.* v. *Corn Products Co.*, 236 U. S. 165.

It is also settled law in this Court that the injunctive relief provided by §4 of the Sherman Act, §15 of the Clayton Act, and §74 of the Wilson Act (15 U. S. C. §§4, 9, 25) must be confined to injunctions "to prevent and restrain" violations of the antitrust laws. *Standard Oil Company of New Jersey* v. *United States*, 221 U. S. 1, 77. *United States* v. *U. S. Steel Corporation*, 251 U. S. 417, aff'g. 223 Fed. 55.

The present order makes no pretense, so far as sequestration of the $59,320 is concerned, of being an injunction to prevent and restrain violation of the anti-trust laws.

This is not a case in which those sections of the anti-trust laws are invoked which permit seizure or forfeiture

of the articles of commerce which are themselves the subject-matter of the illegal conspiracy (§6 of the Sherman Act and §76 of the Wilson Tariff Act, 15 U. S. C. §§6, 11).

4. There is no jurisdiction over the persons of the defendant.

Under federal procedure property may not be attached if the Court has no jurisdiction over the persons of the defendants. *Big Vein Coal Co.* v. *Read*, 229 U. S. 31. *Rorick* v. *Devon Syndicate*, 307 U. S. 299, 309-313.

The Court below expressly declined to pass upon this question, notwithstanding that it is the duty of the Federal Court to satisfy itself of its jurisdiction preceding the grant of an injunction. *Eagle Glass & Mfg. Co.* v. *Rowe*, 245 U. S. 275, 279, 280. *Mitchell* v. *Maurer*, 293 U. S. 237, 244. The petitioners' contest of jurisdiction was raised promptly at the first hearing on the motion in February and at every subsequent hearing. It was supported by voluminous factual affidavits, all of which the Court ignored. A holding that the activities of petitioners subjected them to the jurisdiction of the Court below would be in plain violation of the principles laid down by this Court in *Green* v. *C. B. & Q. Ry. Co.*, 205 U. S. 530, and *People's Tobacco Co.* v. *American Tobacco Co.*, 246 U. S. 79, 87.

5. The complaint fails to state a cause of action.

It is further essential to the grant of a preliminary injunction that the complaint, upon which it is sought to be based, itself state facts sufficient to constitute a claim to the relief to which the plaintiff claims to be entitled. This has been repeatedly held. *Denver* v. *New York Trust Co.*, 229 U. S. 123, 136. *Mecanno, Ltd.* v. *John Wanamaker*,

253 U. S. 136, 141. *Deckert* v. *Independence Corp.*, 311 U. S. 282, 287.

The petitioners raised this point promptly also, filing a full brief upon the subject at the argument before the District Court and amplifying the brief by oral argument. The Court ignored the entire subject in its opinion and substituted an adoption of the allegations of the complaint as the Court's findings of fact.

6. The question is a novel one in this or any other Appellate Court.

Apparently in at least one prior case the Department of Justice has sought to attach property of a foreign defendant in order to force it into our jurisdiction. *United States* v. *I. G. Farben*, Criminal 109-189, 190, 191 (S. D. N. Y., 1941). The defendant in that case apparently submitted, in consideration of the sequestration being reduced to an amount equal to the maximum amount of the fine that might result from ultimate conviction. There are no reports of appeals or even of opinions on the question in the trial courts. A recent law review writer, at a loss to explain the basis for the supposed remedy, suggested that it might be a revival of the common law writ of *distringas*. *Oseas, Antitrust Prosecutions of International Business*, 30 Cornell Law Review 42 (September 1944). There were apparently two analagous common law writs:

(1) The writ of *distringas* was applicable when a corporation could at common law defeat a criminal charge by standing mute, whereupon sequestration of its property was resorted to by writ of *distringas* to force it to answer. There is no recorded case of its being used to force foreign corporations within the jurisdiction of England; and it was early held that the writ was not adapted to this country.

State v. *Ohio & Mississippi Ry. Co.*, 23 Ind. 362. *State* v. *Western North Carolina R. R. Co.*, 89 N. C. 584. *Boston, Concord & Montreal R. R.* v. *The State*, 32 N. H. 415. *Commonwealth* v. *Lehigh Valley R. R. Co.*, 30 Atl. 83 (Pa.).

(2) The writ of *peine forte et dure* served a similar purpose to force an individual who stood mute to plead; he was placed in a

> "low dungeon into which no light could enter; he was to be laid down, naked, on his back, on the ground, his feet and head and loins covered, his arms and legs drawn apart by cords tied to posts, a sharp stone under his back, and as much weight of iron or stone as he could bear, or more than he could bear, placed on his chest. He was to have the next day three morsels of barley bread, without drink; the next, three draughts, as much each time as he could drink, of the nearest stagnant water to the prison, without bread; and such was to be his diet on alternate days, till he died." 3 Bouvier's Law Dictionary, p. 2551 (8th ed. 1914), citing 4 *Blackstone's Commentaries*, p. 324.

7. The order has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

This is true on several grounds.

First. The order was based upon an opinion which in turn was based upon the following finding of fact (R. 169):

> "The facts alleged in the verified complaint are adopted by the Court and incorporated herein as Findings of Fact for the purpose of this motion only."

The verification of the complaint was by a government attorney. Every material allegation of the complaint was contested by sworn affidavits made by persons having a closer knowledge of the facts than would have been available to an attorney in the action.

Second. The opinion was based upon conclusions of law which were (1) that the power to grant the order arose under §4 of the Sherman Act, (2) that it arose under §377 of Title 28, U. S. C. A., and (3) that the Court exercised its discretion to grant the motion. The third conclusion is meaningless. The first conclusion, in respect of §4 of the Sherman Act, was groundless for the reasons given under No. 3 above. The second conclusion, in respect of §262 of the Judicial Code (28 U. S. C. §377), was groundless for the reasons given under No. 6 above.

Third. The only statement of fact contained in the entire opinion was that

> "It is alleged that as one of the results of the conspiracy, the United States Government has been prevented from accumulating a stock pile of industrial diamonds in this country for military purposes." (R. 168)

This statement was, as it implies, based upon a mere allegation. It disregarded the submission by petitioners (both as an exhibit to their brief on the argument, and as an exhibit to an affidavit later incorporated in the record) of a true copy of a treaty between the governments of the United States of America, the United Kingdom and the Dominion of Canada, expressly providing for setting up the stock pile in Canada for military purposes. (R. 137)

Fourth. The opinion recited that the learned District Judge was convinced that damage would result to the government from withdrawal of their funds by the petitioners —damage "incomparably greater than any damage to the corporate defendants if I were to grant the motion." No question of damage to the United States Government could possibly arise. The theory was, as stated in the very next sentence of the opinion, that the sequestration was necessary to protect the jurisdiction of Equity. This was a plain fallacy.

Fifth. The opinion expressed the refusal of the District Court to pass upon the defendants' doing business in the United States, notwithstanding that the petitioners raised that issue at the outset and submitted voluminous factual affidavits in support thereof.

8. The whole case is unfounded, as it would represent a dangerous incursion by the Judicial Department into the conduct of the foreign affairs of the United States.

Under those principles of international judiciary comity sometimes known as "the law of nations", it has been the almost universal practice among civilized peoples not to seek to impose their laws upon foreigners subject to the laws of other nations and not doing business within the nation in which the Court is sitting. The present case is a violation of this fundamental principle.

The theory of the complaint, as presented to the District Court, was that combinations (i) which would be illegal in the United States under the Sherman Act would be legal—indeed might be required by statute (and in this case were shown by the affidavits to be required by statute)—in South Africa and in Great Britain, and yet (ii) might

have, or be intended to have, an indirect effect upon commerce in the United States. From this it was argued that the only relief available to the United States would be to force the foreign parties within the jurisdiction of the United States by sequestering their bank accounts and other properties here.

The theory is precisely the same that would be applied if, for example, (1) Russia were to sequester any property of American companies found in the Soviet Union upon the theory that by their competitive practices they were threatening to disrupt the harmony of a stabilized economy, or (2) the Courts of England were to seize the properties in England of American cotton farmers, because under the Capper-Volstead Act and other legislation American cotton farmers might be planning to avoid a collapse in cotton prices by operating in harmony with the Secretary of Agriculture to avoid dumping their cotton at low prices, with the consequence of a tendency to enhance cotton prices in Lancashire.

The precise charge against the petitioners is that they agreed in South Africa and England not to compete lest their product be dumped into the United States at low prices.

Even if such litigation were not objectionable on principle, it might still be prudent to refrain from it, in view of the fact that the United States is the most prosperous trading nation today and therefore the most vulnerable to retaliatory litigation of this character in the courts of foreign countries.

That the proposed procedure would constitute a dangerous invasion of a function, which, under the wise rule laid down in the *American Banana* case, 213 U. S. 347, is re-

served to the Executive Department, is aptly illustrated by the official announcement yesterday morning on the part of the State Department that an agreement has been made with Chile to the effect that America's war time synthetic nitrogen plants will not compete in peace time with the Chilean nitrate industry, this agreement having been made at the recent Mexico City conference. This is an agreement of precisely the character which the Department of Justice has under attack in the present case. Instances could be multiplied. We have selected this one only because it is the most recent to have been announced.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court directed to the District Court of the United States for the Southern District of New York sitting in the Borough of Manhattan, City, County and State of New York, commanding said Court to certify and send up to this Court on a day to be designated a full and complete transcript of the record and of all proceedings in said District Court had in this case, to the end that this case may be reviewed and determined by this Court; that the order of said District Court be reversed; that the complaint herein be dismissed; and that your petitioners be granted such other and further relief as may appear proper.

ROBERT T. SWAINE,
WM. DWIGHT WHITNEY,
Counsel for Petitioners,
15 Broad Street,
New York, N. Y.

April 5, 1945.

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Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1190.

SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO AND COMPANHIA DE DIAMANTES DE ANGOLA,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI, PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT OF THE PETITION.

JOHN M. HARLAN,
Counsel for Petitioners,
31 Nassau Street,
New York, N. Y.

April 6, 1945.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944.

No.

SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO and COMPANHIA DE DIAMANTES DE ANGOLA,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI.

Now comes John M. Harlan, counsel for the Petitioners above-named (appearing specially for the purpose of this motion and reserving all rights under a motion now pending in the District Court of the United States for the Southern District of New York to dismiss the action against said petitioners and to quash purported service of process upon them upon the grounds that said Court has no jurisdiction over them and that service of process upon them has not been validly effected) and respectfully moves this Court for leave to file the petition for writ of certiorari, hereto annexed, under Section 262 of the Judicial Code (36 Stat. 1162, 28 U. S. C. § 377), directed to the District Court of the United States for the Southern District of New York, to review an order of that Court, entered April 3, 1945, more particularly described in the petition, and for such other and further relief as may be just and proper.

JOHN M. HARLAN,
Counsel for Petitioners,
31 Nassau Street,
New York, N. Y.

April 6, 1945.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1944.

No.

SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO and COMPANHIA DE DIAMANTES DE ANGOLA,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Societe Internationale Forestiere et Miniere du Congo (hereinafter called "Forminiere"), and Companhia de Diamantes de Angola (hereinafter called "Diamang"), appearing specially for the purpose of this petition and reserving all rights under a motion now pending in the District Court of the United States for the Southern District of New York to dismiss the action against said petitioners and to quash purported service of process upon them upon the grounds that said Court has no jurisdiction over them and that service of process upon them has not been validly effected, respectfully pray that a writ of certiorari issue to the District Court of the United States for the Southern District of New York, to review an order of that Court entered April 3, 1945 (R., pp. 99-102), granting the respondent's motion for a preliminary injunction against the transfer or disposition of any assets of the petitioners found in the United States on January 29, 1945,

until the determination of the issues in the action and until the petitioners shall have complied with any final decree that may be entered therein.

A transcript of the record is furnished herewith.

Summary Statement.

The matter involved is an order, entered in a suit in equity brought by the Attorney General against the petitioners and others under the Anti-Trust Laws, requiring in effect that all the property of the defendants found in the United States at the time of the institution of the action be sequestered and held during the pendency of the action and until the defendants shall have complied with any final decree that may be entered against them. (R., pp. 99-102.) The purpose of the sequestration is to provide a fund to be held for an indefinite period of time as security for the enforcement of any decree that may be entered if the respondent is ultimately successful in the action. The order was entered before the determination of any of the issues in the action and before the petitioners' time to answer had expired. The petitioners have property in the United States affected by the order aggregating in value some $779,000. (R., pp. 45-46, 49.)

The action was brought for injunctive relief against alleged violations of the Sherman Act[1] and the Wilson Tariff Act[2]. The business involved is the production and sale of rough diamonds. The petitioner "Forminiere" is a corporation organized under the laws of the Belgian Congo; the petitioner "Diamang" is a Portuguese corporation. They are engaged in the business of mining diamonds in Africa, largely for industrial uses. The principal ground of complaint is the allegation that the producers of diamonds in Africa, including the petitioners, sell their entire output to a South African corporation known as Diamond

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[1] Act of July 2, 1890, ch. 647, §§1, 2, 4, 26 Stat. 209, 15 U. S. C. §§1, 2, 4.

[2] Act of August 27, 1894, ch. 349, §§73, 74, 28 Stat. 570, 15 U. S. C. §§8, 9.

Corporation, Ltd., one of the defendants in the action, and refuse to sell to others. This method of doing business is alleged to restrain the importation of diamonds into the United States and to enhance prices upon such importation. (R., pp. 12-13.)

The respondent's motion for a preliminary injunction was made at the time of the institution of the action. (R., p. 34.) It was based upon the allegations of the complaint, and upon affidavits of a Special Assistant to the Attorney General alleging that "The principal businesses and activities of said defendants are carried on in foreign countries and they could quickly withdraw their assets from the United States and so prevent enforcement of any order or decree which the Court may render," and that "the foreign corporate defendants named herein have endeavored to avoid subjecting themselves to the jurisdiction of the courts of the United States by making their sales abroad only and requiring customers to pay in advance for all purchases." (R., pp. 32, 33.)

The property of the petitioners affected by the order consists of credits established with New York banks for the purpose of buying machinery and supplies to be used in the operation of mines in Africa, together with a quantity of such machinery and supplies which had been purchased but not yet shipped. In the case of "Forminiere", the bank credits aggregate approximately $632,000, and the machinery and supplies purchased have a value of approximately $45,000. (R., pp. 45-46.) The bank credits of "Diamang" aggregate approximately $47,000, and the materials purchased amount to some $55,000. (R., p. 49.)

The respondent does not contend that there is anything unlawful in the ownership or use of these funds and materials. The contention is rather, as stated in the motion, that "sequestration of said property is the only means of enforcing this Court's orders or decree against said foreign corporate defendants." (R., p. 34.)

The petitioners are suffering great and irreparable injury in being deprived of the use of these funds and materials. The machinery and supplies sought to be pur-

chased in the United States are intended to be used for the production of industrial diamonds, which are important to Allied war production and for which there is now an unprecedented demand. Such purchases have been interrupted by inability to make use of the funds brought to the United States for that purpose. The fact that the order does not apply to such funds as the petitioners may be able to bring to the United States after January 29, 1945, does not mitigate the hardship. Funds and property of great value have been rendered useless for an indefinite period, and the obtaining and transmission of dollar exchange in foreign countries is extremely difficult in time of war. (R., pp. 47, 79, 90.)

Jurisdiction to Review.

The date of the order of the District Court for the Southern District of New York sought to be reviewed was April 3, 1945.

Jurisdiction of this Court is invoked under Section 262 of the Judicial Code (36 Stat. 1162, 28 U. S. C. §377). Grant of the common law writ of certiorari is sought in aid of the appellate jurisdiction of this Court in cases arising under the Federal Anti-Trust Laws.

Questions Presented.

1. Whether, in an action to prevent and restrain alleged violations of the Federal Anti-Trust Laws, before any of the issues in the action have been determined and indeed before joinder of issue, the defendants may be required to hold all of their assets found within the jurisdiction throughout the pendency of the action as security for the performance of any decree that may ultimately be entered.

2. Whether, if such a remedy exists, it should be granted upon the unsupported allegations of the complaint and the mere assertion that the defendants are nonresidents and could withdraw their assets and thereby prevent enforcement of a decree, especially where there is grave doubt

that the facts upon which the action is predicated constitute a cause of action cognizable by the courts of the United States.

Reasons Relied on for Allowance of Writ.

1. The order sought to be reviewed is entirely novel in character and is oppressive. In the interests of justice, such an order ought to be subject to prompt appellate review. Section 129 of the Judicial Code[1] provides for appeals to the Circuit Courts of Appeals from orders granting preliminary injunctions, but there is doubt whether this remedy is available in this case because of the provisions of the Expediting Act.[2]. See *United States* v. *California Cooperative Canneries*, 279 U. S. 553 (1929); *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U. S. 137 (1944); *Missouri-Kansas Pipe Line Co.* v. *United States*, 108 F. (2d) 614 (C. C. A. 3rd, 1939). The petitioners have filed a notice of appeal from the order here involved to the Circuit Court of Appeals for the Second Circuit, to be relied upon in the event that it should be determined that certiorari should be denied in this case because of the existence of the remedy of appeal to the Circuit Court of Appeals. Unless a writ of certiorari is issued in this case or appeal to the Circuit Court of Appeals is permitted under Section 129 of the Judicial Code, the petitioners will be deprived of any review of the order until the final disposition of the action, which will necessarily be considerably delayed by war conditions and the difficulties of communication with foreign countries. This would be a denial of justice, since it will then be too late to repair the damage done to the petitioners by the immobilization of all their assets in this country.

2. The questions of Federal law decided by the District Court, as to the power of the court to require petitioners

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[1] Act of March 3, 1891, ch. 517, §7, 26 Stat. 828, 28 U. S. C. §227.

[2] Act of February 11, 1903, ch. 544, §§1, 2, 32 Stat. 823, 15 U. S. C. §§28, 29.

to hold all their assets found in this country at the time of the institution of the action as security for the performance of any decree that may ultimately be entered against them, and as to the circumstances in which such an order may be entered, are important and should be settled by this Court.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court, directed to the District Court of the United States for the Southern District of New York, sitting in the Borough of Manhattan, City, County and State of New York, commanding said Court to certify and send up to this Court, on a day to be designated, a full and complete transcript of the record and of all proceedings in said District Court had in this case, to the end that this case may be reviewed and determined by this Court; that the order of said District Court be reversed; and that your petitioners be granted such other and further relief as may appear proper.

JOHN M. HARLAN,
Counsel for Petitioners,
31 Nassau Street,
New York, N. Y.

April 6, 1945.

BRIEF IN SUPPORT OF THE PETITION.

Opinion Below.

The opinion of the District Court (R., pp. 97-99) has not been officially reported.

Argument.

POINT I.

The order of the District Court is properly subject to appellate review.

The order of the District Court deprives the petitioners of the use of three-quarters of a million dollars for a period which will necessarily be protracted; it interferes with the acquisition of materials and supplies sought to be purchased in the United States; and it may subject the petitioners to substantial liabilities to suppliers with whom contracts have been made for the manufacture of machinery and equipment. In the case of judicial action having such drastic consequences, the parties affected should not be denied the right of appellate review, even if the order were not of a novel and unique character in our law. Postponement of review of the order until after final decree in the action would be in effect denial of review because the force of the order would then have been spent and the damage done by it could not be repaired.

The propriety of appellate review of interlocutory injunction orders is recognized by Section 129 of the Judicial Code (26 Stat. 828, 28 U. S. C. 227), which provides generally that an appeal may be taken to the Circuit Court of Appeals from an interlocutory order or decree granting, continuing, modifying, refusing or dissolving an injunction.

The Expediting Act (32 Stat. 823, 15 U. S. C. §29), which provides that an appeal from a final decree of a District Court in equity suits brought by the United States under the Anti-Trust Laws shall lie only to this Court, does not expressly repeal Section 129 of the Judicial Code, which permitted an appeal to the Circuit Court of Appeals from an interlocutory injunction order in such a case. See, however, *United States* v. *California Cooperative Canneries*, 279 U. S. 553 (1929); *Allen Calculators, Inc.* v. *National Cash Register Co.*, 64 Sup. Ct. 905 (1944); *Missouri-Kansas Pipe Line Co.* v. *United States*, 108 F. (2d) 614 (C. C. A. 3rd, 1939). None of the cases cited involved a situation where there was a preliminary injunction or a statutory right of appeal to the Circuit Court of Appeals under the Judicial Code.

If the effect of the Expediting Act is to eliminate all appeals to the circuit courts of appeals in anti-trust cases brought by the United States and to vest exclusive appellate jurisdiction in this Court, then the only method by which the petitioners may obtain appellate review of the preliminary injunction order is by writ of certiorari issued under Section 262 of the Judicial Code. Such review would not be inconsistent with the objectives of the Expediting Act because it would not delay the progress of the action, which could proceed in ordinary course during the pendency of the writ. See *Ex parte National Enameling & S. Co.*, 201 U. S. 156 (1906). In this respect the situation differs from that presented in *United States* v. *California Cooperative Canneries*, and related cases, *supra*, which involved problems of intervention.

The granting of appellate review in this case would be in accordance with applicable legislation and would be in the interests of justice.

POINT II.

The order of the District Court exacting security from the petitioners for the performance of a possible future decree was beyond the powers of a Federal Court of Equity.

The property of the petitioners affected by the order of the District Court is not the subject matter of the action, and the possession and use of that property in the United States is not claimed to be unlawful. The order is therefore not designed to preserve a *res* which has been brought before the Court or to prevent and restrain violations of law. It is rather a requirement that the petitioners provide security for the performance of a possible future decree and is analogous to attachment or sequestration.

The availability of such a remedy in civil actions is regulated by Rule 64 of the Rules of Civil Procedure. Under this rule the seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action is available only (a) under the circumstances and in the manner provided by the law of the state in which the District Court is held or (b) to the extent authorized by any applicable statute of the United States.

A. The Law of New York does not permit the seizure or impounding of property in an action in equity as security for a decree which may be entered.

The statutes of New York permit attachment only in actions brought solely for the recovery of a sum of money. *N. Y. Civil Practice Act*, §902. Attachment will not lie in an action of an equitable nature whether or not the defendants are nonresidents. *Thorington* v. *Merrick*, 101 N. Y. 5 (1885).

In actions for equitable relief the only process known to the law of New York for the seizure or impounding of the property of a defendant is the writ of sequestration.

In accordance with the accepted usages of Chancery, both in England and in this country, sequestration is a contempt process and is available only after some order or decree has been entered against the defendant and he has failed to obey it.

Hosack v. *Rogers*, 11 Paige 603 (N. Y., 1845);
Pratt v. *Inman*, 43 Ch. Div. 175, 179 (1889);
Hulbert & Crowe v. *Cathcart* (1894), 1 Q. B. 244;
Skinner v. *Educational Pictures Securities Corporation*, 14 Del. Ch. 417, 129 Atl. 857 (1925);
Roberts v. *Stoner*, 18 Mo. 481 (1853).

The absence of power in cases of an equitable nature to require the provision of security for performance of a decree which may ultimately be entered is not remedied by denominating the order as an injunction instead of as an order for sequestration. The substance rather than the form of the order is determinative and an injunction designed to require the defendant to hold property as security for a decree to be entered has uniformly been denied.

Campbell v. *Ernest*, 64 Hun 188, 19 N. Y. Supp. 123 (Sup. Ct., 1892);
Platt v. *Elias*, 101 App. Div. 518 (1st Dept., 1905);
Guth v. *Groves*, 44 F. Supp. 851 (S. D. N. Y., 1942);
Hunnewell v. *New York Cent. & H. R. R. Co.*, 196 Fed. 543 (S. D. N. Y., 1911);
Cities Service Co. v. *McDowell*, 13 Del. Ch. 109, 116 Atl. 4 (1922);
Nelson v. *Smith*, 157 Ore. 292, 69 P. (2d) 1072 (1937).

B. No Federal statute authorizes the entry of an order requiring a defendant to hold a fund as security for a possible future decree.

Although there is no statute of the United States which purports to permit the requirement of security from a defendant in a civil action, the respondent relied in the

District Court on Section 262 of the Judicial Code (36 Stat. 1162, 28 U. S. C., §377) which provides that the Supreme Court, the circuit courts of appeals and the district courts may issue all writs not specifically provided for by statute which may be necessary for the exercise of their respective jurisdictions. This statute is designed to enable the courts of the United States to issue the writs known to our system of jurisprudence in accordance with the principles of law developed for their proper application. The statute is express in requiring that the issuance of writs "be agreeable to the usages and principles of law." The use of the writ of attachment or sequestration to require a defendant in an action for equitable relief to hold security for a possible future decree is contrary to the usages and principles of law, and the use of injunction to accomplish the same result has never been countenanced.

The practice of the Federal courts in this regard has been uniform. Rules 7 and 8 of the Equity Rules formerly in effect permitted the use of attachment and sequestration only as contempt processes to compel obedience to interlocutory or final orders or decrees. Rule 70 of the Rules of Civil Procedure permits the use of attachment or sequestration against a "disobedient party" who has been directed by a judgment to perform some specific act and who has failed to do so. These rules of practice were framed with proper regard for the "usages and principles of law" and the courts of the United States have consistently refused to distort what is in its nature a process of contempt to the purpose of requiring security from a party who is not in contempt.

See

Ross v. *Grafton Power Company*, 60 F. (2d) 663 (D. Vt., 1932);

Martin v. *James B. Berry Sons' Co.*, 83 F. (2d) 857 (C. C. A. 1st, 1936).

The respondent also relied upon Section 4 of the Sherman Act (26 Stat. 209, 15 U. S. C. §4) which confers upon

the district courts jurisdiction "to prevent and restrain violations" of the substantive provisions of the Anti-Trust Laws and which empowers the court before final decree to "make such temporary restraining order or prohibition as shall be deemed just in the premises." The temporary restraining order or prohibition contemplated by this section is one designed to prevent or restrain violations, and the power given by Section 4 has never been used for any other purpose. There is no basis for contending that this section was intended to enlarge the powers of the district courts so as to permit them to fashion novel writs which would violate the established usages and principles of law.

POINT III.

Even if such a remedy were available, the granting of it in this case would constitute an abuse of discretion.

The respondent's motion was based upon the simple assertion that the petitioners could withdraw their assets from the United States and that if they did so the respondent would suffer irreparable injury. (R., p. 34.) This assertion, together with a complaint verified on information and belief by one who admittedly did not have personal knowledge of the facts, is the basis for an order depriving the petitioners of the use of property of great value for an indefinite period of time.

The allegation of irreparable injury is based upon a series of unsupported assumptions. It is first assumed that the respondent will prevail in the action. This is subject to grave doubt. The gravamen of the action appears to be that the petitioners and others have sought to confine their business activities to their own countries. A basic question exists whether their activities in Africa and Europe can be said to fall within the ambit of the laws of the United States. The petitioners were unable to present the facts bearing on the question within the time available because of the difficulties of communication due to war-time condi-

tions. They were under the strongest compulsion to oppose the motion for a preliminary injunction without awaiting the necessary proof in support of defenses to the action. (R., pp. 66-67.) The question whether our courts may deal with such foreign activities should of course be determined upon the evidence and not upon conclusory allegations and characterizations.

A further assumption made by the respondent is that if a decree should ultimately be entered against the petitioners they would refuse to obey it. There is no basis whatever for this assumption, and the likelihood of a refusal to comply with any decree is not even alleged. The petitioners are responsible corporations. Forminiere is largely owned by the Government of the Belgian Congo, which holds 55% of its outstanding stock. (R., p. 84.) The Government of Portugal holds a substantial interest in the profits of Diamang (R., p. 87.) There is no basis for an imputation that corporations operating under such auspices would be likely to flout decrees validly entered against them.

Finally, it is assumed that the court would be powerless to enforce its decree in any manner except by the imposition of fines for contempt and that such fines would not be collectible except out of sequestered funds. This too is a bare assertion without evidence, and inherently improbable.

As against the remote and hypothetical possibility which the respondent suggests as a ground for sequestration, the petitioners have been subjected to the immediate and known injury which necessarily flows from the impounding of assets worth hundreds of thousands of dollars. The injury is completely irreparable because the respondent cannot, of course, be required to furnish any indemnity.

No precedent has been found for such a drastic imposition upon parties against whom there has been no adjudication. Even after adjudication against a party and in the course of contempt proceedings against him, sound judicial discretion would require a showing of facts rather than conjecture as a basis for such an order. *Wahlgren v. Bausch & Lomb Optical Co.*, 77 F. (2d) 121 (C. C. A. 7th,

1935). Here the injury is inflicted upon parties who have not been found to have violated any law and as to whom issue has not yet been joined.

Respectfully submitted,

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Counsel for Petitioners,
31 Nassau Street,
New York, N. Y.

April 6, 1945.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 1189

DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD., and DIAMOND TRADING COMPANY, LTD.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PETITIONERS

ROBERT T. SWAINE,
WM. DWIGHT WHITNEY,
Appearing specially as Counsel for Petitioners,
15 Broad Street,
New York, N. Y.

May 1, 1945.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

DE BEERS CONSOLIDATED MINES, LTD.; DIAMOND CORPORATION, LTD., and DIAMOND TRADING COMPANY, LTD., *Petitioners,* *vs.* UNITED STATES OF AMERICA, *Respondent.*	No. 1189

ON WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PETITIONERS

OPINION BELOW

The opinion of the United States District Court for the Southern District of New York (R. 168) has been reported only in the C. C. H. Federal Trade Regulation Service, April 19, 1945, par. 57,354.

JURISDICTION

Jurisdiction of this Court rests upon the provisions of § 262 of the Judicial Code (36 Stat. 1162, 28 U. S. C. § 377).

The learned District Judge, in an equity proceeding under the Sherman Anti-trust and Wilson Tariff Acts, has

entered an order entitled "Preliminary Injunction" (R. 171), which however is in substance solely a *sequestration* of the bank account of petitioner De Beers in a New York bank, amounting to $59,320. The order enjoins both De Beers and the bank from making any transfer or other disposition of the sequestered account, by express avowal for the purpose of ensuring the presence here of the sequestered account as security for the performance by De Beers of any decree which may ultimately be entered against it in the proceeding.

Summarized, the petitioners' view is that grant of the common law[1] writ of certiorari is appropriate in the present case because it is (a) one of public importance in a field in which (b) appellate jurisdiction lies exclusively in this Court and not in the Circuit Court of Appeals, and (c) the decision below itself rested in part upon the same § 262 of the Judicial Code, and (d) caused immediate and tangible injury to petitioners by sequestering their funds (e) without any support in law.

This Court has exclusive appellate jurisdiction in equity suits by the Attorney General under the Sherman anti-trust law.[1] Judicial Code § 238 (28 U. S. C. § 345). Expediting Act of Feb. 11, 1903, c. 544, 32 Stat. 823, as amended by Act of June 25, 1910, c. 428, 36 Stat. 854 (15 U. S. C. § 29). This Court has said that under these statutes no appeal from an interlocutory order lies to the Circuit Court of Appeals. *United States* v. *California Co-Operative Canneries*, 279 U. S. 553, 558-9. The question as to the

[1] Petitioners have, however, *ex majore cautela*, filed a notice of appeal in the 2nd Circuit Court of Appeals, under § 129 of the Judicial Code, Act of March 3, 1891, c. 517, 26 Stat. 828, 28 U. S. C. § 227.

exercise of a discretionary power to entertain the petition without prior hearing in a Circuit Court of Appeals, which divided this Court in *Ex Parte Peru*, 318 U. S. 578, is absent here.

This Court granted on March 5, 1945, petitions in Nos. 1016 and 1017, *United States Alkali Export Association, Inc.* v. *United States, and California Alkali Export Association* v. *United States*, requesting however that counsel "discuss in their briefs and upon oral argument the question whether the order of the District Court may appropriately be reviewed at the present stage of the proceedings by writ of certiorari under § 262 of the Judicial Code." There are present in this case features which were absent in Nos. 1016 and 1017, as follows:

(1) Actual sequestration of property of the petitioner De Beers, for which a petition under § 262 is the only available form of appellate relief.

(2) An order entered below under purported authority of § 262 itself, and therefore falling within the class of orders which the Solicitor General conceded (in his brief in opposition to grant of the writ in Nos. 1016 and 1017) to provide a characteristic occasion on which this Court had granted the writ. His brief read at p. 6:

> "* * * we summarize immediately below the circumstances under which this Court has issued certiorari under that Section [262]. Certiorari has thus issued * * * (4) to review the action of circuit courts of appeals with respect to the issuance of writs under Section 262 itself;" citing *Whitney* v. *Dick*, 202 U. S. 132, and *McClellan* v. *Carland*, 217 U. S. 268.

STATUTES

AS TO THE WRIT

Judicial Code

Act of March 3, 1911, c. 231, 36 Stat. 1087, 61st Cong., 3rd Sess. (S. 7031, Public 475), as amended.

§ 262 (28 U. S. C. § 377) Power to issue writs. The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

* * * * *

Sec. 24. (28 U. S. C. § 41) The district courts shall have original jurisdiction as follows: * * *

Twenty-Third. Of all suits and proceedings arising under any law to protect trade and commerce against restraints and monopolies.

* * * * *

Sec. 238. (28 U. S. C. § 345) A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts, and not otherwise:

(1) Section 2 of the Act of February 11, 1903, to expedite the hearing and determination of certain suits brought by the United States under the antitrust or interstate commerce laws, and so forth.

Expediting Act

Act of Feb. 11, 1903, c. 544, 32 Stat. 823, 57th Cong., 2d Sess. (S. 6773, Public 82), as amended by Act of June 25, 1910, c. 428, 61st Cong., 2d Sess., 36 Stat. 854 (H. R. 26233, Public 310).

Sec. 1. (15 U. S. C. §28) In any suit in equity pending or hereafter brought in any district court of the United States under the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July second, eighteen hundred and ninety, 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or any other Acts having a like purpose that hereafter may be enacted, wherein the United States is complainant, * * *.

Sec. 2. (15 U. S. C. § 29) In every suit in equity pending or hereafter brought in any district court of the United States under any of said Acts, wherein the United States is complainant, including cases submitted but not yet decided, an appeal from the final decree of the district court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof: * * *.

AS TO THE MERITS

Sherman Anti-Trust Act

Act of July 2, 1890, c. 647, 26 Stat. 209, 51st Cong., 1st Sess. (S. 2, Public 190), as amended.

Sec. 1. (15 U. S. C. § 1) Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the

several States, or with foreign nations, is hereby declared to be illegal:

* * * * *

Sec. 2. (15 U. S. C. § 2). Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty * * *

* * * * *

Sec. 4. (15 U. S. C. § 4) The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * *

Wilson Tariff Act

Act of Aug. 27, 1894, c. 349, 28 Stat. 509, 53d Cong., 2d Sess., (H. R. 4864, Public 227), as amended by Act of Feb. 12, 1913, c. 40, 37 Stat. 667, 62d Cong., 3d Sess. (H. R. 25002, Public 370).

Sec. 73. Every combination, conspiracy, trust agreement, or contract is hereby declared to be contrary to public policy, illegal, and void when the same is made by or between two or more persons or corporations either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or com-

merce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter. Every person who is or shall hereafter be engaged in the importation of goods or any commodity from any foreign country in violation of this section of this Act, or who shall combine or conspire with another to violate the same, is guilty of a misdemeanor, and on conviction thereof in any court of the United States such person shall be fined in a sum not less than one hundred dollars and not exceeding five thousand dollars, and shall be further punished by imprisonment, in the discretion of the court, for a term not less than three months nor exceeding twelve months.

Clayton Act

Act of Oct. 15, 1914, c. 323, 38 Stat. 736, 63d Cong., 2d Sess. (H. R. 15657, Public 212), as amended.

SEC. 12. (15 U. S. C. § 22) *District in which to sue corporation.*—Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

RULES OF CIVIL PROCEDURE

(28 U. S. C. following § 723c).

RULE 4. PROCESS. * * * Service shall be made as follows: * * *

(3) Upon a domestic or foreign corporation * * * by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process * * *.

RULE 64. SEIZURE OF PERSON OR PROPERTY. At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.

RULE 65. INJUNCTIONS. * * *

(d) FORM AND SCOPE OF INJUNCTION OR RESTRAINING ORDER. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only

upon the parties to the action, their officers, agents, servants, employees, and attorneys; and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

STATEMENT

(A) The underlying facts.

The complaint was filed on January 29, 1945, against the petitioners (all South African corporations) and six other foreign corporations and seven individuals. None of the individuals has any connection with the petitioners.[2]

The action has to do with the diamond industry in Africa and in England, the basic facts being:

(1) The first two petitioners (De Beers and Diamond Corporation) are engaged in the Union of South Africa respectively in mining and in purchasing from other miners rough gem and industrial (i. e. raw uncut) diamonds, and are required to sell their diamonds exclusively through a pool established under statute of the Union of South Africa[3] (R. 3, 86, 113).

(2) The petitioner Diamond Trading Company, Ltd., also a South African company, is engaged in selling raw-uncut diamonds in London (R. 18, 86, 114).

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[2] One Parkinson is alleged to be an officer of De Beers (R. 6). He ceased to be such in January 1944 (R. 120), and in any event Parkinson has not been served. The other individual defendants are alleged to have some connection with various corporate defendants other than the three petitioners herein.

[3] In the blue-covered Supplement to this Brief we set out the South African statute (The Diamond Control Act of 1925) as Appendix A.

(3) The other corporate defendants either are, or own stock in, diamond mining companies operating in Africa, the products of which companies are also sold in their raw uncut form in South Africa and London by the petitioner Diamond Trading Company, Ltd. (R. 4-5, 15).

(4) None of such corporations conducts a regular business of exporting into the United States or selling within the United States. Purchasers desiring to have stones cut and polished for the American market and to sell in America purchase the raw uncut diamonds from the petitioner Diamond Trading Company, Ltd. in London (R. 35).

(5) The trade alleged to be restrained is the import and sale (by others than the defendants) of diamonds in the United States (R. 9).

(6) The only actual sales made by any of the petitioners in the United States were these:

(i) De Beers made a single sale in 1940—of the jewels exhibited by it at the New York World's Fair (R. 128).

(ii) Diamond Corporation made a single sale in 1941—to, and at the request of, the Procurement Division of the United States Treasury Department (R. 128).

(iii) Diamond Trading Company has made no sale in the United States, but has made three sales in London to, and at the request of, United States Government Agencies (to the Treasury Department in 1941, to Metals Reserve Company in 1942 and

to United States Commercial Company, a subsidiary of Reconstruction Finance Corporation, in 1944 (R. 129).

These last four sales were all in connection with the war effort, as was the deposit of a stock pile of diamonds made in Canada pursuant to treaty between the governments of the United States, Canada, and of the United Kingdom (R. 137).

(B) The order appealed from.

The government frankly sought the order here at issue as a sequestration ("because sequestration of said property is the only means of enforcing this Court's orders or decree against said foreign corporate defendants" R. 29).

The order does not purport to enjoin the petitioners from any restraint of trade or other action cognizable under the Sherman or Wilson Acts. It is, therefore, not ancillary to the end-relief of an injunction sought by the complaint under those Acts. Nor is a forfeiture sought by the complaint under § 6 of the Sherman Act or § 76 of the Wilson Act.

The District Court's opinion and conclusions of law purport to find power to grant the order under § 4 of the Sherman Act *and* under the same section of the Judicial Code upon which the petition for writ of certiorari was based,—§ 262, 28 U. S. C. § 377. The District Court opinion states (R. 168):

> "* * * that if the injunction does not issue, the assets of the corporate defendants will in all probability be withdrawn from this country. In that event, if the government should succeed in establish-

ing its cause, there would be no way to enforce the decree of the court."

The order was entered upon the complaint and affidavits.

The affidavits upon which the government's motion rested were verified exclusively by one of the government's attorneys. They were devoid of any documentary support, by exhibit or otherwise. No one in the industry supported the application nor was it supported even by any affidavit from any other government official.

The petitioners provided in opposition ten affidavits verified by residents of the United States, all familiar with various phases of the practical industry or with the banking transactions which were the objective of the government's motion for sequestration (R. 85 *et seq.*).

Before the defendants filed any affidavits, however, a temporary restraining order had been granted *ex parte* to the government on January 29, 1945, and had been forthwith served upon a number of banks. Admittedly too sweeping in its terms, it was modified in successive restraining orders issued at ten day intervals and in the eventual order for preliminary injunction (sequestration) (R. 41-52, 62-65, 79-84).

The affidavits for the petitioners served a three-fold purpose:

(1) To prove that there was no jurisdiction in the Southern District of New York or anywhere in the United States over the persons of the petitioners.

(2) To show that allegations of the complaint, possibly material, were erroneous in fact, and

(3). To show that there was no ground upon which to support the preliminary injunction, assuming that as a matter of law the District Court had power to grant an injunction (a sequestration) of the character granted.

In effect, the position taken by the petitioners before the District Court was that (1) the injunction must be denied because the action was unfounded both (a) because the Court lacked jurisdiction over the persons of the defendants-petitioners and (b) because the complaint, perhaps on its face and in any event when read together with the defendants' affidavits, exhibited a case of too dubious a character to support any preliminary injunction, and (2) that the preliminary injunction in itself exceeded the Court's power, as it was not an injunction of the nature provided for under the anti-trust laws.

We must assume upon this petition that the agreements in the Union of South Africa and in the United Kingdom are such as would, if they were made and existed in the United States, be violative of the Sherman Act. It is precisely because the parties to those agreements have been diligent to see to it that they are not present within the United States and that they do not do business here that the government has sought a sequestration of their property here, upon the ground that otherwise the Court will have no means of enforcing their obedience to any decree, for otherwise they will have no motive to accept extra-territoriality for United States law. This is recognized in the opinion of the District Court where, in the paragraphs next after the one already quoted, it says (R. 169):

"The resulting damage to the government, if I were to deny this motion, is incomparably greater than any damage to the corporate defendants if I were to grant the motion.

"Equity will take necessary steps to protect its jurisdiction where, as here, there is a great probability that the enforcement of its decrees will otherwise be frustrated."

SUMMARY OF ARGUMENT

I

FOREWORD AS TO THE CASE GENERALLY AND THE ISSUES OF PUBLIC POLICY NECESSARILY PRESENTED.

We respectfully submit that this is an unusual case in which the entire suit may and should be dismissed at the threshold, and on this hearing.

We refer at the outset to the one sentence which constitutes an entire affidavit *verified by government counsel* (R. 35):

> "EDWARD S. STIMSON, being first duly sworn, says that the investigation which he has made shows the foreign corporate defendants named herein have endeavored to avoid subjecting themselves to the jurisdiction of the courts of the United States by making their sales abroad only and requiring customers to pay in advance for all purchases."

In other words, the Department of Justice has made an investigation and has ascertained that the corporate defendants are doing business solely in parts of the world outside the United States and have expressly determined to confine their business to their own countries and there-

fore not to subject themselves to the jurisdiction of the Courts of the United States. There are here two propositions:

(1) That the defendant foreign corporations make their sales abroad, i.e. not in the United States.

(2) That that is because they wish to avoid subjecting themselves to the jurisdiction of what to them are foreign (*vide* American) courts.

We admit the first and submit that the second cannot then present a justiciable case or controversy. There remains no issue to be litigated.

Under the simplest principles of the Law of Nations, the Courts of the United States should not entertain such a case

The avowed and only, justification which the Department of Justice makes for the action is that the sales of all the products of their African mines by the mining defendants to or through the defendant Diamond Trading Company in London and the practice of the latter corporation in confining its sales entirely to London deprives the ultimate American consumers of competition of the diamond miners among each other in sales which they might otherwise make in the United States. Seizure (by the present order) of the De Beers bank account is sought to be justified as a pressure to compel action which the Courts of the United States would otherwise have no jurisdiction to compel.

The consequences of this new experiment in litigation may be imagined when one refers to such sentences as the following, which are taken from the brief submitted to and filed with the District Court by government counsel,[4] and

[4]The brief appears in Supplement, Appendix B.

which constitute a direct concession that the so-called "injunction" does not relate to the defendants' business, but is designed as an instrument for some ulterior purpose:

> "The temporary injunction here applied for would in no way interfere with the present methods by which the defendants do business. It would not require any alteration in any of their methods of marketing diamonds. They could continue as they have in the past to sell diamonds abroad and compel purchasers to pay for them in advance.
>
> * * * * * *
>
> "These defendants owe no allegiance to our laws. They have formed a monopoly which gives them fabulous profits. To assume that they will not withdraw completely from this country and that they will voluntarily obey a decree of this Court which would destroy such monopoly, one must be extremely credulous. Any such assumption would be contrary to the facts of life. The Government must be, therefore, in a position to sequester the funds of these defendants to enforce any final judgment that may be entered in this case so as to secure its effective enforcement." (p. 26)

The reasoning is that the bank deposits must be seized because if the Court issues a decree, the defendants will not be found in the jurisdiction at all.

If the judicial power of sequestration (assuming it to exist in the Federal courts) is to be used as the chosen instrument to force British and South Africans to conform to our economic standards, where is it to end? Obviously, the British and South Africans can then reciprocally seize the bank accounts of our citizens in their countries because they may think it economically wrong of us to engage in the free competitive system. The Union of Soviet Socialist

Republics may seize the bank accounts of our citizens in their country because our competitive system is patently antipathetic to their conception of a stabilized economy.

The present case not merely compels consideration of these fundamental concepts. It provides on its owns facts an extreme illustration. The Department of Justice has, both in the complaint (R. 19) and in the brief below, attacked the petitioners for establishing a stockpile of diamonds in Canada instead of in the United States. It did not disclose to the Court below that there was in existence an Executive Agreement under which that stockpile was established. The petitioners thereupon placed it in the record (R. 137). It is an Agreement formally entered into between the Government of the United States, represented by its Minister in London, and the Governments of the United Kingdom and of the Dominion of Canada. (See signatures at R. 144). *Cf. Cook* v. *United States*, 288 U. S. 102.

That an ulterior purpose of the suit was to compel removal of the British diamond stockpile into the United States, thus getting around the solemn engagement made by our government, was expressly stated in the government's brief below:

> "* * * defendants have in Canada a large stockpile of industrial diamonds which has been established to meet the war needs of American industry. The defendants could as readily hold this stockpile in this country. That is where it is to be used. To move that stockpile here would not inconvenience the defendants in the slightest. As a matter of fact, they could so easily thus provide security, any unwillingness on their part to transfer the stockpile, or a portion of it, from Canada to the United States would

warrant an inference that they do not intend to comply with any judgment of this Court.

* * * * *

"* * * Defendants can readily afford this assurance either by giving bond to render themselves amenable to the process of this Court or by moving within this jurisdiction and maintaining here the stockpile of industrial diamonds which they now maintain in Canada for supply to American war industry."[5]

This is asking the Court to bring pressure to bear upon Great Britain and Canada so as to get a better deal for the American public than was obtained by the agreement which its duly accredited representatives in the State Department have negotiated and signed. If this nation is to indulge in the practice of negotiating treaties with Allies, and then try by pressure to get around them and force the Allies to accept terms which in the negotiation they did not accept, we submit that the Courts are not the proper place to commence the practice.

II

SPECIFICALLY AS TO THE ORDER APPEALED FROM.

The sole effect of the order, so far as these petitioners are concerned, was to sequester property. Rule 64 F. R. C. P. applies. The order is invalid, and is supported neither by Federal equity practice nor by New York State practice.

The order, although in substance a sequestration, is in form an injunction. If it be treated as an injunction, it

[5]Supplement, Appendix A, pp. 27, 37.

is governed by Rule 65 F. R. C. P. There is no authority under that rule for a provisional attachment or sequestration of a defendant's property as an incident to a suit to restrain unlawful conduct.

Under no theory is the Court empowered to restrain the use by the defendants of their own money.

Under the circumstances shown here, the order, even if within the power of the Court, was an abuse of its discretion.

The order of course falls if the suit itself be unfounded, —either if the complaint fails to state a claim or if the Court lacked jurisdiction over the persons of the defendants. Both of these factors are present in this case.

The complaint contains no statements of fact to the effect that any of these petitioners entered into any contract, combination or conspiracy in the United States, or did any acts in the United States in furtherance of such a contract, combination or conspiracy. All of the material acts are stated upon the face of the complaint to have happened abroad. The rule in *American Banana Company* v. *United Fruit Company*, 213 U. S. 347 applies.

It is apparent upon the record that there is no substantial ground upon which to base a claim of jurisdiction over the persons of the petitioners. The government's case to the contrary is based upon unsupported statements in the affidavit by an attorney, and in any event such statements do not show facts from which an inference may be drawn either that the petitioners are doing business or are found in the United States. The case for the petitioners is presented in numerous affidavits of record and is so overwhelming as not to leave even a scintilla of doubt upon the question. The question was timely raised before the Dis-

trict Court, and further error was committed by the Court's refusal to consider it.

ARGUMENT

POINT I

THE ORDER—AN INJUNCTION IN FORM AND A SEQUESTRATION IN SUBSTANCE—WAS BEYOND THE POWER OF THE COURT AND UNDER THE CIRCUMSTANCES HERE WAS ALSO AN ABUSE OF DISCRETION.

Certain of the points presented by the government to the trial court in support of the order have been abandoned here.[6] In its brief in opposition to the petitions for writs of certiorari (referred to herein as "its br.", at pp. 11-13), the United States disclaimed intention to support the order upon any of the following grounds:

(1) That the order is supportable under Rule 64 of the Rules of Civil Procedure either as an attachment or seizure,

(2) That the order is valid as a sequestration, or

(3) That the order may be supported as a means of compelling defendants to appear.

The affirmative ground now exclusively given by the government in support of the order is that it is a valid

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[6] Thus, (i) the motion for preliminary injunction claimed that "sequestration * * * is the only means of enforcing this Court's orders" (R. 29), and (ii) one of the point headings in the government's brief below was that "The application for this injunction asks the court to exercise the equivalent of its intrinsic power as a court of equity to issue the writ of *ne exeat*, and exercise of this power against a foreign corporation is not subject to the limitations upon issuance of a writ against an individual."

preliminary injunction under Rule 65 of the Rules of Civil Procedure and "is proper for the purpose of preserving the effective jurisdiction of the District Court" (its br. 9).

Both the preliminary conditions which are contested by us are assumed by the government:

(1) That the complaint states a cause of action, and

(2) That the court below has obtained personal jurisdiction of the petitioners.

Absence of either of these conditions would be fatal to the order. *Deckert* v. *Independence Corporation*, 311 U. S. 282, 287, and cases cited.

We put in issue before the District Court both these assumptions, and supported our position by affidavit, brief and argument. The learned District Judge committed error in supposing that he was entitled to ignore them (R. 169).

Accordingly, in Points II and III, *infra*, we argue that the complaint fails to state a cause of action and that the District Court did not obtain personal jurisdiction of the defendants. In this Point I we argue that the injunction order is bad, accepting *arguendo* the government's assumption that the complaint states a cause of action and that there is personal jurisdiction.

Upon the validity of the order as such, our arguments are two-fold, first, that it is not in fact an injunction at all, but is in fact a sequestration (as the government's motion sought that it should be), and second, that even if it be an injunction, it is not one recognized by law.

(1) The order below was not in fact an injunction but was a sequestration, at least so far as these petitioners are concerned.

The only practical effect of the order on any of these petitioners was to sequestrate $59,320 on deposit by De Beers in a New York bank.[7]

The order is in form that the defendants

> "be enjoined from withdrawing money belonging to the corporate defendants from banks in the United States and from withdrawing diamonds or other property belonging to the corporate defendants from safe deposit boxes in the United States and from withdrawing from the United States or selling, transferring, or otherwise disposing of property belonging to the corporate defendants in the United States until this case has been finally determined and said foreign corporate defendants have complied with all orders and decrees which may be or have been rendered against them in this cause",

with the usual provisions binding their officers, agents, etc. and other persons having notice of the order (R. 172-3).

Thus the order relates to existing funds and does not seek to prevent or restrain any future activity of any sort. Indeed, this was expressly disclaimed by the second paragraph of the order, which expressly disclaimed application to enumerated transactions which would represent conduct of business after the date of the original restraining order

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[7] No assets of either of the other two petitioners were found within the United States and no assets of De Beers other than the deposit in question, which had in fact been made upon the day that the preliminary restraining order issued (R. 125). Apparently before that day none of the petitioners had any assets in the United States of any sort.

(January 29, 1945), such as transmission of further funds from abroad, purchase of diamonds or of mining machinery, etc. (R. 173).

This is a case, therefore, in which what was entitled "Preliminary Injunction" was in effect an attachment, seizure, or "sequestration" of assets. As such it falls properly within the scope of Rule 64 rather than Rule 65. And in substance that seems to be the ground upon which the government supports it. The final paragraph of its argument here in support of the order (its br. 14) opened thus:

> "The need for the injunction was imperative to enable the court to give effect to any final decree entered against the petitioners. Only through sequestration of their funds located here, for non-compliance with a final decree against them on the merits, as authorized by Rule 70 of the Rules of Civil Procedure, will the District Court have power to afford the government relief and to make the court's final judgment effective."

Such language is appropriate to Rule 64:

> "At the commencement of and during the course of an action, all remedies providing for seizure of persons or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner", etc.

Although the government purports to disclaim in this Court invocation of Rule 64 (its br. 9, 12), we will under sub-heading (3) of this Point give the reasons why Rule 64 is indeed inapplicable.

(2) Assuming that the order be treated as an injunction under Rule 65, it is without support in law.

The governing principle is that a preliminary injunction must be within the permissible scope of the final injunction sought in the action. We agree with the government that its purpose is of course to maintain the *status quo*. But there is no general inherent power in Courts to maintain the *status quo* pending litigation, except as that maintenance is accomplished by a temporary order of the same character that may ultimately be granted upon a permanent basis as a result of the litigation. The cases relied upon by the government are all of that class. *Looney* v. *Eastern Texas Railroad Company*, 247 U. S. 214. *Kline* v. *Burke Construction Company*, 260 U. S. 226. *Ohio Oil Co.* v. *Conway*, 279 U. S. 813. *Virginia Railway* v. *Federation*, 300 U. S. 515. *Gibbs* v. *Buck*, 307 U. S. 66. *Deckert* v. *Independence Corporation*, 311 U. S. 282.

In *Looney* an injunction was sought against the institution of suits by a State Attorney General pending a determination by the Interstate Commerce Commission, and the preliminary injunction issued against the prosecution of a suit of that character.

In *Kline* the injunction was denied, but had it been granted, it would have been of the same character as the ultimate relief sought in the action (viz. to enjoin further prosecution of a proceeding in a state court of concurrent jurisdiction).

Ohio Oil was a suit to prevent the enforcement of a Louisiana tax alleged to be unconstitutional, and the pre-

liminary injunction prevented collection of the same tax pending the proceedings.[8]

In *Virginian Railway*, the Federation sought a mandatory injunction that the Railway should treat with the Federation pursuant to the terms of the Railway Labor Act, and the decree restrained interference with the Federation as the accredited representative of the employees.

In *Gibbs* v. *Buck*, the bill attacked the constitutionality of the Florida anti-trust law, and the preliminary injunction was against its enforcement pending the hearing.

In *Deckert* v. *Independence Corporation* the bill was by purchasers to enforce their rights under the Securities Act of 1933 for rescission and restitution by an insolvent vendor. The complaint joined a third party holding assets belonging to the vendor and sought an injunction against disposition of such assets. The preliminary injunction was of the same quality, viz. to prevent such disposition pending determination of the cause.

None of these cases supports the new theory of the Department of Justice that, in an action seeking prevention and restraint of violations of the anti-trust laws, the Court may "enjoin" the defendants from all use of their property even in the absence of a showing or claim that the assets were to be used in furtherance or in aid of the putative conspiracy.

The Sherman Act does contain (in § 6) provision for the remedy of seizure and condemnation of property imported into the United States contrary to law. A similar

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[8] The preliminary injunction was based upon the consideration that the State law had no provision for the return of a tax illegally exacted and was guarded by this Court with provisions for punctual payment of the pre-existing tax, against application for the new tax, and for prosecution of the suit with reasonable expectation to a final decree. 279 U. S. at p. 815.

provision is found in § 76 of the Wilson Tariff Act. But the order is not sought to be supported under these sections. If it were, it would be equally unavailable, as there is no claim by the government that the bank deposit is the subject-matter of the conspiracy.

The government frankly stands upon the naked ground that the District Court may, by way of injunction, seize innocent assets so as to have a sort of francpledge against the possibility that, in the event that it eventually enters a decree and that thereafter the defendants disobey it and that neither of the defendants nor any of their assets are then within the jurisdiction, it may recoup its fine for contempt by forfeiting the property. The government has been able to find no authority to support this proposition, and we respectfully submit that it is wholly untenable.

(3) No provisional attachment or sequestration of a defendant's property is appropriate as an incident to a suit to restrain unlawful conduct.

The government's affidavit in support of the restraining order and the preliminary injunction stated that it was necessary to sequester the defendants' property (including bank accounts) for fear that the Court would not have the means of enforcing obedience to its ultimate judgment in the case.

No such remedy is available in equity cases in our Federal Courts.

(A) *This is particularly true of anti-trust cases.*

Under the anti-trust laws the government is confined to the remedies which those statutes provide. *Paine Lumber Co.* v. *Neal*, 244 U. S. 459. *Geddes* v. *Anaconda Copper*

Mining Co., 254 U. S. 590. *Wilder Mfg. Co.* v. *Corn Products Co.*, 236 U. S. 165, 174. *Hartford-Empire Co.* v. *United States*, 65 Sup. Ct. 373, 385, 387-8.

The present injunction order does not seek "to prevent and restrain" violations of the anti-trust laws. *Cf. Standard Oil Company of New Jersey et al.* v. *United States*, 221 U. S. 1, 77-78. *United States* v. *American Can Company, et al.*, 234 Fed. 1019, appeal dismissed, 256 U. S. 706. Its sole purpose is to exercise compulsion upon the defendants, so that they will take the affirmative action, which the Department of Justice desires, of doing business in the United States.

(B) *And it is a settled rule of Federal procedure generally.*

Rule 64 of the Federal Rules of Civil Procedure provides that seizures of person or property "for the purpose of securing satisfaction of the judgment ultimately to be entered * * * are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought."

(a) The rule did not seek to change the established rule of Federal procedure that remedies by seizure of person or property are appropriate only when jurisdiction over the person of the defendant has already been obtained. *Big Vein Coal Co.* v. *Read*, 229 U. S. 31. *Rorick* v. *Devon Syndicate*, 307 U. S. 299, 309-313. *Laborde* v. *Ubarri*, 214 U. S. 173, 174. *Ex Parte Railway Co.*, 103 U. S. 794.

It is established in New York that attachment cannot be had at all in equity cases, but only (and of course under

limited circumstances) in cases where money recovery is sought at common law. C. P. A. § 902. 7 Carmody, New York Practice § 309. *Therington* v. *Merrick*, 101 N. Y. 5. *Brown* v. *The Chaminade*, 176 Misc. 238, aff'd 261 App. Div. 1071. *Avery* v. *Avery*, 119 App. Div. 698. The Federal Courts followed the New York rule, apart from the adoption of the Federal Rules of Civil Procedure. *Lazenby* v. *Codman*, 28 F. Supp. 949 (S. D. N. Y., 1939). *Shiel* v. *Patrick*, 59 Fed. 992 (C. C. A. 2d).

The New York rule that seizure of property by attachment is improper in a suit for injunction must be taken to mean that in such a case attachment may not be justified on the ground that it is issued for the purpose of securing satisfaction of possible fines for contempt of the injunction.

(b) Similarly, in a suit in equity where, as here, no final disposition of property is sought, a court may not appoint a receiver *pendente lite* to take charge of the property of the defendant. *Gordon* v. *Washington*, 295 U. S. 30, 37:

> "But there is no occasion for a court of equity to appoint a receiver of property of which it is asked to make no further disposition. The English chancery court from the beginning declined to exercise its jurisdiction for that purpose. *Anonymous*, 1 Atkyns 489, 578; *Ex parte Whitfield*, 2 Atkyns 315; *Goodman* v. *Whitcomb*, 1 Jacob & Walker 589, 592; *Robinson* v. *Hadley*, 11 Beavan 614; *Roberts* v. *Eberhardt*, Kay 69, 148, 160, 161."

(c) The remoteness of the government's claim that it must have funds out of which to collect fines in the event of an eventual contempt makes the common law writ of sequestration improper. Before property may be sequestered the plaintiff's claim must be reduced to judgment or

the plaintiff must have some right of ownership in, privilege to or lien upon the specific property sought to be reached. *Martin* v. *J. B. Berry Sons' Co.*, 83 F. (2d) 857 (C. C. A. 1st); *Applegate* v. *Applegate*, 39 F. Supp. 887 (E. D. Va.); *Ross* v. *Grafton Power Co.*, 60 F. (2d) 663 (D. Vt.). The First Circuit Court of Appeals held in the *Martin* case, in a tort action, that an injunction *pendente lite* restraining defendant from conveying certain negotiable promissory notes, was improper and would not issue until the creditor obtained a judgment against the defendant.

(d) This is not a case in which the injunction *pendente lite* is sought to protect specific property the subject-matter of the action. (1) Such equitable relief will protect only the *res* which is the subject-matter of the action, and (2) will be granted only when that *res* is within the jurisdiction of the Court.

In *Iron City Savings Bank* v. *Isaacsen*, 158 Va. 609, 164 S. E. 520 (cited by the Department below), the Court, in holding the preliminary injunction improper, said:

> "* * * Where process has been served in person on all indispensable parties, or the court has acquired jurisdiction of the *res* and all indispensable parties have been brought before the court by personal service or order of publication, the jurisdiction to grant a temporary injunction is actual chancery jurisdiction * * *." (p. 528)

Similarly, in *Ward* v. *Arrendono*, 1 Hopk. (N. Y.) 213, and *Fisk* v. *Union Pacific R. R. Co.*, Fed. Cas. No. 4,830 (cited by the Department below) real property and property constituting a trust fund, respectively, were involved. In *Cobb* v. *Interstate Mortgage Corp.*, 20 F. (2d) 786

(C. C. A. 4th) (cited by the Department below) transfer of specific corporate assets upon which plaintiff had an equitable lien was enjoined.

Campbell v. *Ernst*, 19 N. Y. Supp. 123, states the rule:

> "* * * before any act can be restrained it must be violative of the rights of the plaintiff respecting the subject of the action * * *."

In the present case the De Beers account with Standard Bank of South Africa (the only property of any of the three petitioners affected by the proposed injunction) is by no stretch of the imagination a subject-matter of this action.

(4) An injunction restraining the defendants from use of their moneys is improper.

An injunction restraining defendants from use of their moneys will not lie even where a plaintiff seeks money damages. *A fortiori*, it is improper where the plaintiff merely seeks a final injunction restraining wrongful acts of a defendant.

Both Federal and New York State law provide for seizure of property only *after* fines have been imposed. Criminal Code, 18 U. S. C. § 569. N. Y. Judiciary Law §§ 753, 773, 792.

The Department has pointed to no authority, either common law or statutory, for tying up property in a suit for an injunction for the purpose of satisfying putative fines which may result from a putative contempt of a putative injunction.

It is fundamental in equity practice that a preliminary injunction is one to hold the situation in *statu quo* and that it must be of the same character as the ultimate injunction sought (1 High on Injunction, § 4). Here (as

suming that there is some cause of action over which the Court has jurisdiction) the ultimate injunction must be one authorized by statute—to prevent and restrain violations of the anti-trust laws. Such an injunction might be one to prevent and restrain the entry into agreements *within the United States*, or the doing of acts *within the United States*, designed to raise the price of diamonds or to otherwise restrain trade therein or to monopolize it. See paragraphs 2 and 3 of the prayers of the complaint. Obviously, the De Beers deposit could not be subjected to perpetual impounding under any such injunction.

"The fact that the suit is brought under the Sherman Act does not change the principles which govern the granting of equitable relief." *Appalachian Coals Inc.* v. *United States*, 288 U. S. 344, 377.

The similar State Court rule was expressed by the Appellate Division of the 1st Department in *Platt* v. *Elias*, 101 App. Div. 518, where plaintiff, in an action against an individual defendant and various banks to compel an accounting, had obtained in the lower court an injunction *pendente lite* restraining the individual defendant from conveying or disposing of any property, and the defendant banks from paying out any deposits. In reversing the order granting the injunction, the Appellate Division pointed out that upon the final accounting plaintiff would not be entitled to recover any specific property of the defendant. The Court said (p. 523):

> "* * * the plaintiff is no more entitled to an injunction in this action than in any case in which a cause of action is alleged against a defendant and the plaintiff then asks to sequestrate all of the defendant's property so that it may be held to apply to any judgment which he may obtain against the defendant."

Accord: *Maine* v. *Alexander*, 115 App. Div. 112. *Golden* v. *Tauster*, 125 N. Y. Supp. 83; *Wright Co.* v. *Aero Corp.*, 128 N. Y. Supp. 726; and *Broadfoot* v. *Miller*, 174 N. Y. Supp. 497.

POINT II

THERE IS AN INSUPERABLE OBJECTION TO THE MAINTENANCE OF THIS ACTION: THE COMPLAINT DOES NOT STATE A CLAIM COGNIZABLE BY UNITED STATES COURTS.

It is essential to the grant of a preliminary injunction that the complaint, upon which it is sought to be based, itself state facts sufficient to constitute a claim to the relief to which the plaintiff claims to be entitled. This has been repeatedly held. *Denver* v. *New York Trust Co.*, 229 U. S. 123, 136. *Mecanno, Ltd.* v. *John Wanamaker*, 253 U. S. 136, 141. *Deckert* v. *Independence Corp.*, 311 U. S. 282, 287.

(1) This suit violates principles of the Law of Nations which have been recognized by this Court.

It has been expressly held that the Sherman Act is subject to the principles of the Law of Nations as to territoriality. *American Banana Co.* v. *United Fruit Company*, 213 U. S. 347, *supra*. This accords with the almost universal rule in civilized States.[9]

[9]It is well known in international law that Mexico is the one country that has stood out for the other rule; but in the famous case of A. K. Cutting, a United States citizen who was arrested in Mexico for an alleged libel published in Texas against a Mexican subject, the United States intervened diplomatically and demanded Cutting's release. See *Moore, Digest of International Law* (1906) Vol. II, § 201. An extended consideration of the applicable principles and review of the laws of the other States follows in § 202.

The general principle was stated for this Court in the carefully considered case of *United States v. Curtiss-Wright Corporation*, 299 U. S. 304, 319[10]:

> "Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens (see *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 356); and operations of the nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law. As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family."

Oppenheim, International Law, 2d ed. (1912) Vol I, p. 204 says:

> "No right for a State to extend its jurisdiction over acts of foreigners committed in foreign countries can be said to have grown up according to the Law of Nations * * *."

A footnote gives emphasis to the point by quoting the exception proposed by the Institute of International Law at its meeting at Munich in 1883:

> "Every State has a right to punish acts committed by foreigners outside its territory and violating its penal laws when those acts contain an attack upon its social existence or endanger its security and when they are not provided against by the Criminal Law of the territory where they take place."

[10]Only Mr. Justice McReynolds dissenting; Mr. Justice Stone not participating.

The anti-trust laws, although important to our economic conceptions, can hardly be said to be of such a type that violation of them abroad can be an attack upon our social existence or endanger our security.

We are not arguing that this principle of the Law of Nations precludes the adoption of a contrary rule by the Congress of the United States. We are not arguing that the Constitution prohibits the Congress from adopting rules repugnant to the Law of Nations if it chooses to do so. But it has been said in this Court that International Law is a part of our law and as such is a law of all States of the Union; *The Paquete Habana*, 175 U. S. 677, 700, repeated in *Skiriotes* v. *Florida*, 313 U. S. 69, 72-3. And it must at least be true to this extent, that the Congress will not be presumed to have intended a statute to violate the Law of Nations unless it clearly says so.

There is thus a union between two approaches to the problem. First, in the absence of Congressional enactment, this Court will apply the Law of Nations as part of the law of the land. Second, Congressional action would be presumed to be in accordance with the Law of Nations, unless the contrary is made plain.

This Court has found occasion to exercise the exception recognized by the Law of Nations in respect of criminal and tortious acts, or other defiances of its own law, *by its own citizens* abroad. Illustrations of this are to be found in *New York Central* v. *Chisholm*, 268 U. S. 29, recognizing a remedy in tort against a New York Railroad Company operating in Canada, *United States* v. *Bowman*, 260 U. S. 94, where a United States citizen made a false and fraudulent claim in a foreign country against a United States Government Agency, and *Blackmer* v. *United States*, 284 U. S.

421, where a United States citizen in Paris ignored a subpoena to testify in a case of public importance in the District of Columbia.

Another type of special case, really illustrative of the rule and not an exception to it, is where the foreign action was intended to be and was in fact operative in the United States. Illustrations are to be found in *United States* v. *Nord Deutscher Lloyd*, 223 U. S. 512, in which a steamship line was withholding funds abroad by way of obtaining payment for transportation from a United States port whence the statutes of the United States required it to provide such transportation free of charge, and *United States* v. *Twenty-five Packages of Panama Hats*, 231 U. S. 358, a fraud upon the United States Customs. A border line case was *Sandberg* v. *McDonald*, 248 U. S. 185, in which by a divided Court it was held that wages need not to be again paid upon arrival in the United States, although the United States law would have forbidden the payment in advance that had in fact been made at Liverpool. The *Sandberg* case was, however, reaffirmed by a unanimous Court in *Jackson* v. *S. S. Archimedes*, 275 U. S. 463.

In every one of these cases without exception the *Banana* case was cited as having stated the general rule. The following is the most frequently selected quotation from the *Banana* case, 213 U. S. 347 at 356, 357:

> "But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. * * * For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only

> would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent. * * * The foregoing considerations would lead in case of doubt to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power 'All legislation is *prima facie* territorial.' "[11]

The quotation is closely applicable to our case. In our case the Court below has 'happened to lay hold of' a bank account of the petitioner and is proceeding on that basis 'to treat him according to its own notions rather than those of the place where he did the acts.' Ours is a strong case, because the notions of the place where he did the acts have been translated into the statute law of that place. It is an especially strong case because the other sovereigns with whose authority the order constitutes an interference (the United Kingdom and the Union of South Africa) are sovereigns now allied with the United States in a great war and have evidenced their good faith by arranging for a stockpile in neighboring Canada of the article of commerce in question specially available to the war industry of the United States.

There is no doubt but that the allied nations in question would follow the rule for which we contend. The leading case applicable throughout the British Empire is the decision of the Judicial Committee of the Privy Council in *Sirdar Gurdyal Singh* v. *The Rajah of Faridkote* [1894] A. C. 670. The case was regarded as an unusually impor-

[11] Thus quoted in *New York Central* v. *Chisholm*, *supra*, 268 U. S. 29 at 31-2.

tant one, and seven members of the Judicial Committee sat (five being the ordinary quorum). The principle underlying the opinion of Lord Chancellor the Earl of Selborne is succinctly stated in the headnote:

> "No territorial legislation can give jurisdiction which any foreign Courts ought to recognise against absent foreigners who owe no allegiance or obedience to the Power which so legislates.
>
> "In all personal actions the Courts of the country in which the defendant resides, not the Courts of the country where the cause of action arose, should be resorted to."

The application of the principle was in a case in which the public was interested. The headnote continues:

> "Where a Faridkote Court passed ex parte money decrees against the defendant, who had been treasurer of Faridkote, but at the date of suit had ceased to be such, and was resident in Jhind, of which State he was a domiciled subject:—
>
> "*Held*, that such decrees were a nullity by international law."

Lord Selborne pointed out "that all jurisdiction is properly territorial", a principle which lies "at the root of all international, and of most domestic, jurisprudence on this matter." He distinguished legislation "as between different provinces under one sovereignty (e.g., under the Roman Empire)" where "the legislation of the sovereign may distribute and regulate jurisdiction." He then referred to the American authorities—Story on Conflict of Laws, and Chancellor Kent's Commentaries.

We assume that this Court will be reluctant to respond with a doctrine under which the principles of the anti-trust laws are to be imposed upon all British subjects in respect of the conduct of their business in the British Empire, merely because they open in this country bank accounts which have no connection with any doing of business here.

(2) No part of the subject-matter of this case is factually alleged to have occurred within the territory of the United States, at least so far as these petitioners are concerned.

The substance of the complaint is that the defendants refuse to sell diamonds within the United States (particularly that they do not maintain a stockpile here instead of in Canada), and that their operations abroad are monopolistic under American legal concepts. Except for the conclusory allegation of paragraph 2 (unsupported by any factual allegation, and untrue in fact as to petitioners) that all the defendants do business in the United States; there is not a single act or agreement alleged in the first 56 paragraphs of the complaint which was not, as shown by the complaint itself, performed, entered into and completed wholly outside the United States.

Allegations such as that of paragraph 53 that a defendant "sometimes sells direct to purchasers in the United States * * * on order by direct mail or cable or through brokers" are followed (as in paragraph 54) by an allegation that such purchases are paid for in advance before delivery in London, thus demonstrating as a matter of law that the business transactions sought to be alleged with a contrary innuendo have occurred wholly outside the United States (R. 18-19).

Paragraph 57 alleges the existence of bank deposits in the United States, the obtaining by the defendants of re-

ports as to market conditions in the United States, and a single sale to the United States government in the United States. Paragraph 57 e, R. 19-21. These facts obviously have no relation to the alleged conspiracy, none of them has the slightest semblance of illegality, and none of them is complained of.

The only other transactions alleged in the United States as having any connection with the alleged conspiracy are the advertising (by De Beers only—not by either of the other two petitioners) of cut gem diamonds as desirable gifts for sentimental occasions. The obvious purpose of the advertising is to stimulate a demand for the ultimate diamond product in this country and thus indirectly to stimulate purchases by dealers or cutters of the raw uncut diamonds sold in London. Par. 57 a and b, R. 20. It is significant that the prayer for relief does not mention the advertising, nor is it mentioned in the present order.

Allegations that defendants have property in the United States, that they obtain economic reports from wholly independent sources within the United States, or that they advertise the ultimate product within the United States, can neither support the cause of action which the complaint purports to state nor conceal the fact that the alleged cause of action deals solely with extra-territorial acts of the defendants.

The government will doubtless refer to the allegation in its complaint that the principal market of diamonds is in the United States (par. 29, R. 9) and to the general conclusory allegation that the conspiracy in Africa and England was intended to operate in restraint of the foreign commerce of the United States (par. 30, R. 9-10).

As to the first, the answer is that the principle of territoriality recognizes no exception for cases in which the country of the forum is merely an ultimate market for goods affected by transactions abroad. It is under the laws of South Africa and Great Britain that all stages of dealing with raw uncut diamonds take place, from the production at the mine in South Africa to the sale in London. It may well be that these raw materials become (after cutting or other fabricating) industrial and gem diamonds, and that a majority of these in turn find their way into the foreign commerce of the United States. But if that be a justification for the United States Courts reaching back in their jurisdiction over all of the earlier stages of production, the same must be true of all the products of the world for which the United States is a principal market. Where is it to end?

And if that is to be the principle applicable under our laws, why is it not equally applicable under the laws of other nations? Lancashire, for example, may consider itself a principal market for Southern cotton; and the English Courts, hearing of the new doctrine now advanced by the United States Department of Justice, might then take the view that the proper forum in which to settle the economic principles to govern the production and sale of Southern cotton would be the Royal Courts of Justice in The Strand, London.

As to the general conclusory allegations that there was an intent to restrain foreign commerce of the United States, these can not, under familiar rules of pleading, be operative in the absence of supporting allegations of fact. Of course, unless it were alleged that there was either an effect upon, or intent to affect, the foreign commerce of the

United States, the complaint would not even have the semblance of propriety. But more is needed than a mere conclusion. The complaint goes on to describe in considerable detail the history and nature of the diamond business in Africa and Europe, as the Department of Justice investigators have understood it. It is abundantly plain that no claim is made that any essential step in the production or marketing of diamonds is taken by any of the petitioners within the United States, or even that at any step there is a discrimination by the petitioners against purchasers who may intend ultimately to use or resell in the United States in favor of purchasers from other countries.

The complaint is not predicated upon any specific effect upon our commerce, but is rather directed against the entire method of conducting the business in Africa and England.

(3) It is settled that the anti-trust laws do not have extra-territorial effect.

The leading case is of course *American Banana Company* v. *United Fruit Company*, 213 U. S. 347, in which it was held that the United States had no jurisdiction over even the most violent acts done abroad to suppress competing banana producers and even though an indirect result was to monopolize trade in a commodity principally destined for sale in the United States.

Mr. Justice Holmes said, for a unanimous Court (at pp. 355, 357):

> "It is obvious that, however stated, the plaintiff's case depends on several rather startling propositions. In the first place the acts causing the damage were done, so far as appears, outside the jurisdiction of the United States and within that of other

states. It is surprising to hear it argued that they were governed by the act of Congress.

"* * * 'All legislation is prima facie territorial.' *Ex parte Blain, In re Sawers,* 12 Ch. Div. 522, 528; *State* v. *Carter,* 27 N. J. (3 Dutcher) 499; *People* v. *Merrill,* 2 Parker, Crim. Rep. 590, 596. Words having universal scope, such as 'Every contract in restraint of trade,' 'Every person who shall monopolize,' etc., will be taken as a matter of course to mean only every one subject to such legislation, not all that the legislator subsequently may be able to catch. In the case of the present statute the improbability of the United States attempting to make acts done in Panama or Costa Rica criminal is obvious, yet the law begins by making criminal the acts for which it gives a right to sue. We think it entirely plain that what the defendant did in Panama or Costa Rica is not within the scope of the statute so far as the present suit is concerned."

The *Banana* case is to be contrasted with *United States* v. *Sisal Sales Corporation,* 274 U. S. 268, in which it was shown that the whole plan to monopolize the article of commerce (sisal produced in Yucatan, Mexico) was worked out in New York by an agreement between bankers and others and carried out by the creation of exclusive selling corporations inside the United States. Mr. Justice McReynolds said (p. 276):

"Here we have a contract, combination, and conspiracy entered into by parties within the United States and made effective by acts done therein. The fundamental object was control of both importation and sale of sisal and complete monopoly of both internal and external trade and commerce therein."

Uniformly and without exception it has been recognized that our anti-trust laws do not reach acts or agreements entirely completed outside the United States and not requiring any act or thing to be done within the United States.

United States v. *383,340 Ounces of Quinine Derivative*, Admiralty No. 98-242 (S. D. N. Y., 1928), involved an alleged foreign cartel monopolization of quinine. However, unlike the present case, the alleged cartel sent the quinine to the United States and sold it here. The government seized the quinine here under the forfeiture provisions of the Wilson Tariff Act. A decree ultimately entered contained the following:

> "(f.) Provided, however, that nothing herein contained shall be construed to restrain or prohibit any defendant from doing any act or entering into any agreement which is entirely completed outside the United States and which does not require any act or thing to be done within the United States."

United States v. *Deutsches Kalisyndikat Gesellschaft*, Equity No. 41-124, S. D. N. Y., 1929, involved an alleged foreign cartel monopolization of potash. Sales were admittedly effected within the United States. The decree recognized that no law of ours could force the French and Germans to compete for American business. It provided:

> "(4) Provided that no provision of this decree shall be construed to prevent defendants from selling and delivering all or any part of their potash salts outside of the United States to a corporation organized under the laws of any country other than the United States regardless of any stock ownership or other interest in said corporation by any or all

> of the parties hereto; or to prevent said corporation from selling and distributing in the United States such potash salts so acquired * * *"

That our anti-trust laws do not apply to wholly extra-territorial acts even by American corporations was recognized by this Court as recently as in the opinion in *Hartford Empire Co. et al.* v. *United States*, decided January 8, 1945, 65 Sup. Ct. 373, 385, with reference to paragraph V (D) of the decree.

The Department of Justice now seeks to disregard this settled law and, by seizure of funds of these South African companies in the United States, to *force* them (1) to conduct their business outside the United States acc ing to American concepts, irrespective of the laws of the countries under which they are organized and are doing business, and (2) to extend their business into the United States.

The government's memorandum below made plain that the primary purpose of the Department of Justice was to force the defendants to remove all or part of a stock-pile of diamonds from its present location in Canada to the United States and to make sales here out of the stockpile so established here (Supplement, Appendix B, pp. 24-27). At p. 24 it complained:

> "* * * They [the defendants] would not allow this Government to establish a stockpile of industrial diamonds in the United States; the most they would do was to establish such a stockpile in Canada, which could be drawn on only under certain conditions."

And on pp. 25-26:

> "Defendants * * * require purchasers to come to London to purchase diamonds and to pay for them

in advance; they insist that the stockpile of diamonds for our war effort be placed in Canada in their possession; * * *"

And on p. 27:

"* * * defendants have in Canada a large stockpile of industrial diamonds which has been established to meet the war needs of American industry. The defendants could as readily hold this stockpile in this country. That is where it is to be used. To move that stockpile here would not inconvenience the defendants in the slightest."

Yet this stockpile was maintained in Canada pursuant to *an agreement among the Governments of the United States, Canada and the United Kingdom of Great Britain and Northern Ireland, entered into March 26, 1943* (*Article 3*). A copy of that Agreement is in the record, R. 137. The conditions under which the Government of the United States is entitled to make withdrawals, which the Department claims to be a part of the defendants' illegal conspiracy and one of the "violations of law." (Complaint, par. 54), are imposed by this Agreement (Article 6). The Agreement recognizes the very relationships between the defendants which the Department attacks, and it provides that sales out of the stockpile shall be in accordance with those relationships (Article 9). The action of the defendants of which the Department complains is, by the terms of the Agreement, subject to the control of the British Ministry of Supply, an official war office of the British Government (Appendix V). Article 4 of the Agreement leaves to the British Government (not to the defendants or the Government of the United States) determination as to whether a portion of the stockpile shall be in the United States.

The alleged cause of action, therefore, is the making of arrangements by the defendants for the sale, outside the United States, of raw uncut diamonds produced outside the United States, all of which arrangements are completed outside the United States, and the purpose of the Department is to set aside those arrangements and compel the defendants to conduct operations within the United States, notwithstanding that other branches of the Government of the United States have entered into formal agreements with the British and Canadian Governments recognizing—indeed requiring—the very transactions which the Department attacks.

The Department is thus in substance seeking to seize funds of foreign companies as a weapon to compel them (1) to breach the arrangements provided for by a solemn international agreement to which the United States is a party, (2) to bring other property into the United States, and (3) to conduct business in the United States. Employment to such an end of such injunction as is here sought would not only be a gross breach of international good faith but a gross abuse of the injunctive process.

(4) Under English law the acts here complained of were legal.

Immediately following the adoption of the Sherman Act, modern English law took a course sharply divergent from that which was destined to be taken in the United States. *Mogul Steamship Company* v. *McGregor, Gow & Co.*, [1892] A. C. 25, in which the plaintiff relied upon American decisions.

In *North Western Salt Company, Limited* v. *Electrolytic Alkali Company, Limited* [1914] A. C. 461, the case was an extreme one, as shown by the headnote:

> "The plaintiff company was a combination of salt manufacturers formed for the purpose of regulating supply and keeping up prices, and it had the practical control of the inland salt market. The members of the company were entitled to be appointed as its distributors, i.e., agents to sell on behalf of the company the salt which it had purchased from them. The defendants, who had not joined the combination, agreed to sell to the company for four years 18,000 tons of salt per annum, of which a certain proportion was to be table salt, at a fixed uniform price per ton, and undertook not to make any other salt for sale. * * * The defendants having sold salt in violation of this agreement, the plaintiff company sued them for breach of contract."

Indeed, the case was so extreme that a majority of the Court of Appeal, notwithstanding the authority of the *Mogul Steamship* case, held that the contract was in restraint of trade and illegal. [1913] 3 K. B. 422. The decision was reversed. We quote from the speech of Lord Chancellor Haldane [1914] A. C. at p. 469:

> "Unquestionably the combination in question was one the purpose of which was to regulate supply and keep up prices. But an ill-regulated supply and unremunerative prices may, in point of fact, be disadvantageous to the public. Such a state of things may, if it is not controlled, drive manufacturers out of business, or lower wages, and so cause unemployment and labour disturbance. It must always be a question of circumstances whether a combination of manufactures in a particular trade is an evil from a public point of view."

The rule in conflict with our own has persisted in England. First the Court of Appeal and later the House of

Lords sustained enforcements by trade associations of blacklists on the ground that the effort to exclude competitors was actuated by motives not of spite but of *bona fide* desire to protect the defendants' own trade interests. *Ware and De Freville, Limited, v. Motor Trade Association* [1921] 3 K. B. 40. *Sorrell* v. *Smith and others*, [1925] A. C. 700.

A final effort to find a distinction was made in *Thorne* v. *Motor Trade Association* [1937] 3 All England Reports 157. By the rules of a trade protection association, in pursuance of a policy of price protection, the members were required to sell their goods at fixed prices and not to sell such goods to any person, whether a member or not, who sold such goods at other than the fixed prices. Again, the association circulated a black list. Again, the House of Lords was unanimous in adhering to the established rule.

We respectfully submit to this Court that it is impossible to read the carefully reasoned, unequivocal and unvarying decisions of the long succession of England's leading judges who sat in these cases and then to contrast them with the equally carefully reasoned, unequivocal and unvarying decisions of the members of this Court over the same period of history, all upon the same issue,—interpretation of the words "restraint of trade",—without being profoundly impressed by the difficulties which must arise if the Law of Nations be displaced and there be substituted a conception that the Courts of each nation are to sit in judgment upon the economic practices within another nation.

POINT III

PETITIONERS' AFFIDAVITS ESTABLISH THAT THE DISTRICT COURT HAD NO PERSONAL JURISDICTION OVER THESE PETITIONERS.

Under federal procedure property may not be attached if the Court has no jurisdiction over the persons of the defendants. *Big Vein Coal Co.* v. *Read*, 229 U. S. 31. *Rorick* v. *Devon Syndicate*, 307 U. S. 299, 309-313.

The Court below expressly declined to pass upon this question, notwithstanding that it is the duty of the Federal Court to satisfy itself of its jurisdiction preceding the grant of an injunction. *Eagle Glass & Mfg. Co.* v. *Rowe*, 245 U. S. 275, 279, 280; *Mitchell* v. *Maurer*, 293 U. S. 237, 244. The petitioners' contest of jurisdiction was raised promptly at the first hearing on the motion in February and at every subsequent hearing (R. 57, 59). It was supported by voluminous factual affidavits, all of which the Court ignored. A holding that the activities of petitioners subjected them to the jurisdiction of the Court below would be in plain violation of the principles laid down by this Court in *Green* v. *C. B. & Q. Ry. Co.*, 205 U. S. 530, and *People's Tobacco Co.* v. *American Tobacco Co.*, 246 U. S. 79, 87.

(1) None of these petitioners is or has been doing business or is "found" in the United States. The Government theory that a corporation is found here because it advertises here, is fallacious.

The subject-matter of this litigation is raw uncut diamonds, not diamonds cut into gems such as are purchased retail in the United States. The complaint is that diamond miners in South Africa (e.g. petitioner De Beers) sell their raw uncut diamonds, not into the United States, but to companies in Africa (e.g. petitioner Diamond Corporation) or London (petitioner Diamond Trading). Diamond Corporation also sells its raw uncut diamonds to Diamond Trad-

ing in London, which in turn insists on consummating its own sales exclusively in Africa or London (except that a stockpile is maintained in Canada).

It is not claimed that these petitioners sell, or indeed purchase, or even solicit, in the United States.

The defendants are South African corporations; they have not been licensed to do business in any state in the United States (R. 3-4); they maintain no office or place of business in the United States (Appendix B, p. 26); nor do they have any employees in this country (R. 104-7, 132). They have no merchandise here, and have made no sales here except for a total of five isolated sales since 1938, all but one to the United States Government itself and made pursuant to the government's request (R. 127-130). No corporate meetings are held in this country, and none of their directors or officers resides here (R. 86, 132). Except for temporary bank credits, they own no property in ~~this State~~ New York or in any other state (R. 122-6).

The transactions of the petitioners in the United States were isolated and trivial:

Diamond Trading, which is engaged in the business of selling rough uncut diamonds in London, has had no transactions of any sort in or with the United States except only that, at the express request of the United States Government, for the sake of national defense and the war effort, it has, in the last five years, made a total of five sales to and at the request of United States government agencies—the Procurement Division of the Treasury Department, Metals Reserve Company and United States Commercial Company (R. 129).

Diamond Corporation sent two lots of diamonds to the United States (R. 128)—one for exhibition at the New

York World's Fair in 1939, the other presumably for security against enemy seizure in June 1940, and in 1941 sold to the Procurement Division of the Treasury Department such balance of the two lots as remained in the United States.

De Beers has (1) at various odd times had representatives in the United States for brief periods and for special purposes, for example to arrange an exhibit at the New York World's Fair of 1939 (R. 105); (2) has received reports as to the general conditions of the diamond trade in the United States, in only one case a report from one of its own representatives (R. 100, 115), (3) has made a single sale in the United States, viz. of the diamonds that had been exhibited at the New York World's Fair (R. 127), and (4) has contracted with an American advertising firm to advertise cut gem diamonds in the United States (R. 86 *et seq.*).

The basis for the government's theory that these petitioners are found here rests ultimately upon the proposition that De Beers advertises in American newspapers and magazines and employs an American advertising firm to conduct such advertising.

Had the advertising been the element of which the Department of Justice was really complaining, the remedy sought would have been an injunction against the advertising, which would of course be effective to prevent American publishers from publishing the prohibited advertisements irrespective of the absence of the defendants from this country.

That the Department did not seek such an injunction was established by its waiver, in the restraining order as modified after argument (R. 62 at 64) and in the injunc-

tion order (R. 171 at 173), of the prohibition in the original *ex parte* restraining orders (R. 35, 46-7) against use for any purpose of funds subsequently sent by the defendants to United States banks. On the argument (March 2) "counsel for De Beers Consolidated Mines Ltd. asked that the temporary restraining order be modified to permit the continuance of the advertising and publicity campaign and public relations work being carried on in the United States for De Beers Consolidated Mines, Ltd., and counsel for the United States consented thereto" (R. 62).

Even if advertising were a badge of doing business, the De Beers case would be an extreme one in favor of the defendant. De Beers neither advertises the products which it itself mines and sells nor does it itself prepare, conduct or even supervise the advertising.

Its advertising does not in any way solicit purchasers of a De Beers product. It is purely good-will advertising, to encourage the purchase of the ultimate product gem diamonds, in the hope that there may indirectly and eventually be a larger market for De Beers raw products—the rough uncut diamonds.[12] The distinction is an important one, as the price paid to De Beers for its rough diamonds is normally only a small fraction of the price paid by the customer in America for the ultimate gem diamond that is being cut from the rough diamond (R. 27).

Incidentally, these considerations appear eloquent of the government's entire misconception of the diamond trade in launching upon this case. The government's main complaint is that De Beers has kept diamonds off the market in order to increase prices to American purchasers (R. 22-24). But as shown in the affidavits, the interest of all three

[12] A full set of De Beers advertisements is on file with the Clerk of this Court (R. 177-8).

petitioners has been to sell the maximum number of diamonds. De Beers does not advertise in order to restrict purchases, and De Beers has consistently maintained that prices in America are higher than they ought to be (R. 96-8).

Furthermore the De Beers advertising is done by an independent contractor, not officers or employees of De Beers.

(2) It is well settled that the advertising and publicity work conducted by Ayer & Son, an American advertising firm, on behalf of a foreign client would not be "solicitation of business" within the established meaning of the word.

The cases cited by the government in its memorandum below for the proposition that soliciting business constitutes doing business are not in point because the advertising carried on by Ayer & Son was not "solicitation of business" within the established meaning of the word.

The "solicitation" involved in the case at bar differs from that involved in the cases cited by the government in three fundamental respects. These differences are contrasted in the parallel columns below:

In the cases cited by the government,	In the case at bar,
(1) The sales agents were engaged to solicit the public to purchase merchandise from or to enter into transactions with the defendant.	(1) The public was "solicited", if at all, to purchase from independent jobbers and retailers articles (cut gem diamonds) that did not and never had belonged to any of the defendants (who were miners and sellers only of rough uncut diamonds).

(2) The solicitation consisted of sending agents into the State to personally request and take orders for the defendants' product.	(2) The "solicitation", if such it was at all, consisted merely of advertisements and news items appearing in newspapers and magazines.
(3) The persons conducting the solicitation were employees and agents of the defendant exclusively engaged in promoting sales of the defendant's product.	(3) The firm conducting the "solicitation", if such it was at all, was an independent contractor. Being one of the oldest and largest advertising concerns in this country and having many clients both here and abroad, it devoted only a part of its time in publicizing diamonds. In advertising and publicizing diamonds it was carrying on its own separate business.

It is well established that the activity described above in the second column is not "solicitation of business" within the established meaning of the word.

Each of the three factual distinctions will be discussed in the order listed above.

(1) *The advertising carried on by Ayer was designed to induce the public to purchase from independent jobbers and retailers and did not solicit anyone to make purchases from the defendants.*

It is established beyond dispute that this type of publicity is not "solicitation of business."

The most recent recognition of this principle is contained in *Frene v. Louisville Cement Co.*, 134 F. (2d) 511 (C. C.

D. C., prevailing opinions per Rutledge and Edgerton, *J. J.*, with Stephens *J.* dissenting), generally regarded as the most extreme decision in favor of jurisdiction that has yet been rendered. There Mr. Justice Rutledge distinguished the earlier case of *Whitaker* v. *Macfadden Publications*, 105 F. (2d) 44 (C. C. D. C., 1939, Edgerton, *J.*) by saying:

> "In the Whitaker case there was no 'solicitation' of business by the agent *in the usual sense, but only the stimulation of the sales of an independent jobber.*"

In the *Whitaker* case the defendant, a New York magazine publisher, employed and directly paid an agent, one Pendergast, and four assistants, to promote and to supervise the sales of defendant's magazines among street vendors in Washington, D. C. Defendant sold and shipped its magazines to, and collected payment from, the District News Company of Washington, D. C. The District News Company resold and collected from retailers and street vendors. The defendant was held not to be doing business within the District of Columbia. In so holding the Court distinguished between the activities of an agent who solicits the public to enter into transactions directly with a defendant and those of an agent of a producer who solicits the public to purchase from retailers. The Court illustrated the distinction by contrasting Pendergast's activities with those of the local agents in *Green* v. *C. B. & Q. Ry. Co.*, 205 U. S. 530:

> "* * * The local agents of the Burlington solicited persons *to enter into transactions with their employer*, but the local agents of Macfadden do not; the transactions which Pendergast and his assistants

promote are *sales by the District News Company to newsboys or by newsboys to the public.* The Burlington agents made contracts and received money for their employer, but the Macfadden agents do neither. * * *" [emphasis added.]

Similarly, Mr. Justice Rutledge contrasts Pendergast's "stimulation of sales of an independent jobber" with that of the agent in the case before him, who devoted his entire time to soliciting the public to enter into transactions *with the defendant.*

The distinction is also illustrated in the other cases referred to by Mr. Justice Rutledge in which, on very similar facts, the agent was held not to be doing the business of the defendant: *Krieger* v. *Macfadden Publications,* 38 F. Supp. 472 (D. C. Md., 1941); *Cannon* v. *Time, Inc.,* 115 F. (2d) 423 (C. C. A. 4th, 1940). To the same effect: *S. B. McMaster, Inc.* v. *Chevrolet Motor Co.,* 3 F. (2d) 469 (E. D. S. D., 1925).

There can be no question but that the publicity work of Ayer & Son falls directly within the category of cases which Mr. Justice Rutledge designated as mere "stimulation of sales of an independent jobber." The relationships between an African diamond miner and an American diamond retailer are incomparably more remote than the relations between a New York magazine publisher and a District of Columbia newspaper vendor. After the rough uncut diamond leaves De Beers' hands it passes through many intermediaries, including brokers, importers and other dealers in rough diamonds, fabricators commonly called diamond cutters, wholesalers and retailers. The price paid for the finished diamond by the ultimate buyer is many times the price received by the producer for the

rough diamond. In the *Whitaker* case, *supra*, the magazine, after leaving the hands of the defendant-publisher, passed only through the hands of the District News Company and the ultimate vendor.

The rule that stimulation by a producer of the sales of independent jobbers is not "solicitation" recognizes the fact that (i) soliciting the public to purchase one's wares "although probably essential" is nevertheless "incidental and collateral" to the doing of most businesses, *Green* v. *C. B. & Q. Ry. Co.*, 305 U. S. 530, 532, and the further fact that (ii) inducing the public to trade with ultimate jobbers or retailers is incidental to doing the business of producing the product sold by the retailers.

(2) *The activity carried on by Ayer & Son was merely advertising and was not personal solicitation by agents for orders.*

Where a defendant sends its agents into a state to personally solicit the public to enter into transactions with the defendant (and sufficient additional business activity is carried on), the defendant is said to be doing its business in that state. *International Harvester Co.* v. *Kentucky*, 234 U. S. 579. *Frene* case, *supra*. However, where no agents are sent into the state to take orders for the defendant, it cannot be said that defendant is doing its business therein merely by reason of the publicity given by advertising to defendant's product.

It is clear that when the cases use the term "solicitation", they refer to active personal solicitation through agents, and do not refer to mere advertising.

Thus Mr. Justice Rutledge, in his opinion in the *Frene* case, used the term "solicitation" as synonymous with

"taking of orders" or "selling" (p. 516), and expressly pointed out that the solicitation of orders through an agent must be distinguished from "creation of good-will and furtherance of good relations between the defendant and its customers or the ultimate customers of its product." The lower court was there reversed for the very reason that it assumed that these two activities were indistinguishable. Again, in the *Frene* case the agent's personal solicitation of orders for brixment was described as "energetic selling methods." He personally requested the plaintiff to use brixment in the construction of his house, invited plaintiff's business partner and wife to a theatre and dinner in an effort to promote the use of brixment, and invited plaintiff to luncheons where the use of brixment was discussed. The agent also personally procured orders for defendant's product from building supply dealers. He devoted his entire time to the promotion of defendant's merchandise. Among the agent's duties "was also the prevention of claims and disputes. It was taking a part, though not a final one, in adjusting them. It was aiding with problems of the Company's obligations." (p. 518). The defendant expressly instructed the agent to visit specific jobbers where its product was being used and to assist in straightening out whatever complications had arisen or might arise.

The lower court held that the prevention of claims and disputes was merely the creation of good-will and was part of the process of solicitation, and therefore that no "solicitation plus" was involved in the case. The Court of Appeals reversed, holding that the creation of good-will was not part of the process of solicitation and that, therefore, more than "solicitation" was involved.

The reason for the rule that mere advertising does not constitute doing business was well stated by Judge Brewer in *Carpenter* v. *Westinghouse Air-Brake Co.*, 32 Fed. 434 (C. C. S. D. Iowa, 1887) (p. 436):

> "* * * If we say that the mere matter of advertising a business is the introduction of that business in the state, it would follow that every corporation located elsewhere that should send its circulars into the state, send newspapers with its advertisement, would be engaged in its business in that state, and to be found there for purposes of suit."

If the advertising here in question is held to be the basis for jurisdiction over these foreign corporations, the manufacturer of every nationally advertised product will be subject to suit in every state in the union. Placing an advertisement with a magazine having a nation wide circulation, or buying radio time over a national network, would force the manufacturer of the product advertised to defend actions brought in any one of the several states. It is obvious that this is not what Congress intended when it required that process be served upon a foreign corporation in the district where it may be "found."

Even more circumspect must be the approach to a wholly foreign corporation engaging merely in advertising here.

(3) *Ayer & Son carried on the advertising of diamonds as its own separate business. Ayer is an independent contractor and not an agent of the defendants.*

In order to hold that an agent is carrying on the business of the defendant within the territorial jurisdiction of

a court, it must be found that the activity carried on by the agent is the business of the defendant, and not merely the separate business of the agent.

In the cases cited by the government in its memorandum below not only did the sales agents personally solicit prospective customers to buy the defendant's merchandise directly from defendant, they were also employees and agents of the defendant engaged exclusively in promoting sales of the defendant's merchandise.

However, by way of contrast, in the cases where a sales agent solicits the public to purchase directly from the defendant but the sales agent is engaged in the general business of soliciting orders for a number of companies, it is held that the business conducted by the sales agent is his own and not that of the defendant.

Moreover, where, as here, the activities in question are carried on, not by an employee, but by an independent contractor, it is held that the independent contractor is carrying on his own business and not that of the defendant. *Bank of America* v. *Whitney Bank*, 261 U. S. 171. *Cannon Mfg. Co.* v. *Cudahy Co.*, 267 U. S. 333.

In the case at bar the advertising and publicity work of Ayer & Son was its sole and separate business; it has no business other than the sales promotion of various products, and the advertising here in question was merely a part of its regular business. On the other hand, the business of De Beers is the mining of diamonds in Africa and the selling of the rough uncut products of its mines. The stimulation of purchases of the finished diamond in America is so far incidental to the business of De Beers that such activity, carried on through an independent advertising company, cannot be considered as the business of De Beers.

(3) Even if the advertising be considered the equivalent of "solicitation of business", there was not enough additional activity carried on in New York to subject the defendants to service of process here.

The facts upon which the government relied appear in one of the affidavits of Mr. Stimson, of government counsel, at R. 73 *et seq.* After stating the intercorporate stockholdings of the petitioners, there follows this paragraph:

> "All the officers and employees of De Beers Consolidated Mines, Ltd., Diamond Corporation, Ltd. and Diamond Trading Company, Ltd. reside outside of the United States and to the knowledge of deponent, all the property belonging to the three corporations, with the exceptions hereinafter set forth, is located in countries outside of the United States."

The affidavit then attempts to alleviate these necessary concessions by suggesting that the petitioners "have followed the practice of regularly sending their officers and employees to the United States to transact the business of the three companies." To this there are two answers:

First. Assuming that the evidence offered by Mr. Stimson establishes his thesis that petitioners are "transacting business" in the United States, this is still insufficient, in the absence of a further showing that the petitioners "do business" and are "found" within the United States. The conception of "transacting business" has relevance only to the venue in which a corporation may be sued under the antitrust laws. Clayton Act § 12, 38 Stat. 736, 15 U. S. C. § 22. But process must be "served in the district in which it is an inhabitant or wherever it may be found" (*id.*). These petitioners are inhabitants of South Africa, and the

sole issue therefore is whether they are "found" within the United States.

Where American corporations are concerned, they may be sued in districts where they "transact business", although not "found", and process may then be served where they are found. *Eastman Kodak Company* v. *Southern Photo Materials Company*, 273 U. S. 359. To be found within a district, two tests must be met: A subjective test—that the corporation has subjected itself to the local jurisdiction (which is expressly disclaimed by the government, R. 35); and an objective test—that it is *carrying on* business within the jurisdiction. *Ibid.*, at p. 371. But a corporation may be "*transacting* business" within a jurisdiction, even though it closes no contracts there but merely does such acts as sending its traveling salesmen into the district to solicit orders or is sending demonstrators into the district to explain the nature and quality of its goods, neither of which activities would suffice to support a holding that the corporation is so "*doing* business" as to be found there. *Ibid.*, at pp. 370-1. See also *Bank of America* v. *Whitney Central National Bank*, 261 U. S. 171. The conception of being "found" is therefore assimilated to the conception of "*doing* business", as distinct from "*transacting* business". See also *People's Tobacco Company* v. *American Tobacco Company*, 246 U. S. 79, 84, 86.

As to a foreign corporation, the conception of "transacting business" therefore has no materiality, and such a corporation is open to suit in the United States only if it "does business" and is "found" here. The government has not made a serious attempt even to establish either of these ultimate facts. See the double use of the phrase "transact

business" in the relevant portion of the Stimson affidavit (R. 74).

Second. The evidence relied upon by the Stimson affidavit as establishing that the petitioners "transact" business in the United States is as follows:

(a) That one officer of De Beers was in the United States for most of 1941 and 1942, and another for six months in 1943-1944, during which period office space was furnished to them by the advertising firm of N. W. Ayer & Son, Inc. or the independent mining firm of Newmont Mining Co. (Stimson, R. 74; compare Shelly,[13] R. 104-107 and Secretary of Newmont Mining, R. 126).

(b) That the purpose of the visits was to direct the advertising, report to the home office on market conditions generally in the United States, investigate complaints, hold conferences in order to promote goodwill, and the like (Stimson, R. 74-75; compare Shelly, *id.*).

(c) That the petitioners' officers "carried on negotiations with the officers of the United States Government in respect of selling large amounts of diamonds" (Stimson, R. 75; compare Simpson, R. 127-130).[14]

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[13] Shelly, a Vice-President of N. W. Ayer & Son, Inc. supplied a detailed affidavit relating to all of these points (R. 85-107).

[14] L. S. Simpson furnished an affidavit of fact based on cables from South Africa and describing the isolated sales in the United States. *Simpson*, associated with the petitioners' attorneys, is not to be confused with *Stimson*, who made the affidavits on behalf of the government.

But it later appears precisely what these negotiations were,—that they were at the request of the government in connection with the war effort and for the purpose of a certain limited number of specific sales.

(d) That petitioners displayed diamonds at the New York World's Fair in the years 1939 to 1941 (Stimson, R. 75; compare Shelly, R. 105).

(e) That De Beers contributed sums of money to associations such as the Gemological Institute of America, the American Gem Society and Jewelry Industry Publicity Board (Stimson, R. 75).

(f) That N. W. Ayer & Son, Inc. did little special services such as investigating retail prices, reporting on government price regulations, on complaints about diamonds, and on hour and wage conditions of diamond cutters in the United States, "and receives and forwards mail for" petitioners. All of these are explained in the Shelly affidavit (Stimson, R. 76; compare Shelly 99-104).

(g) That De Beers owns an interest in a bank entitled Banque Diamantaire Anversoise (Stimson, R. 78). A detailed affidavit from the managing director of the Banque discloses that De Beers and Diamond Corporation, Limited, together own less than 10% of its stock (R. 108-114).

We appreciate that it is not the function of this Court to pass upon facts, particularly if and when they have been passed upon below. But these facts were *not* passed on below, because the learned District Judge thought (we submit erroneously) that personal jurisdiction of the

defendants was unnecessary. And we further submit that the sum total of all these facts falls so far short of what is necessary to hold that a foreign corporation is doing business and is found within the United States, that it must be held as a matter of law on this ground, if on no other, that the Court below lacked power to issue the order appealed from and abused its discretion in doing so.

In *People's Tobacco Company* v. *American Tobacco Company*, 246 U. S. 79, it was held that the defendant was not amendable to process in the foreign State although it issued circulars, advertised its product, sold its merchandise directly to jobbers in the State, sent its agents or drummers into the State to solicit orders of the retail trade to be turned over to the local jobbers, and owned stock in local subsidiary companies which owned stock in companies carrying on the tobacco business in Louisiana.

By way of contrast, De Beers does not sell its merchandise in the United States; it does not send agents into this country to personally solicit orders; it does not own stock in companies doing business in the United States; and it has given power of attorney to no one in this country to perform acts of any kind on its behalf.

That the absence of these factors is conclusive, is shown by the manner in which the Court distinguished *International Harvester Co.* v. *Kentucky*, 234 U. S. 579:

> "The plaintiff in error relies upon *International Harvester Co.* v. *Kentucky*, 234 U. S. 579, but in that case the facts disclosed that there was not only a continuous course of business in the solicitation of orders within the State, but there was also authority upon the part of such agents to receive payment

in money, checks and drafts on behalf of the company, and to take notes payable and collectible at banks in Kentucky; these things, taken together, we held amounted to doing business within the State of Kentucky in such manner as to make the Harvester Company amenable to the process of the courts of that State."

The decision in the *Tobacco* case was made subsequent to and in light of a long line of decisions to the same effect. *Peterson* v. *C. R. I. & P. Ry. Co.*, 205 U. S. 364. *Green* v. *C. B. & Q. Ry. Co.*, 205 U S. 530. *International Harvester Co.* v. *Kentucky*, 234 U. S. 579. *Philadelphia & Reading Ry. Co.* v. *McKibbin*, 243 U. S. 264.

In *International Harvester* v. *Kentucky*, for example, the foreign corporation not only regularly and continuously sent agents into Kentucky to solicit orders personally, but the agents had authority to bind the company contractually and to conclude sales. The selling agents were also authorized to receive payment in checks, drafts or notes of customers. Defendant's machines were regularly delivered into the State pursuant to the orders taken and accepted by the defendant's agents.

And in *St. Louis S. W. Ry.* v. *Alexander*, 227 U. S. 218, the foreign corporation rented and maintained in New York an office which had defendant's name on the door. A director of the defendant corporation resided in New York and attended to and adjusted claims against the Company. Plaintiff's claim was taken up and handled from the New York office.

The contrast between such cases and our own is manifest.

CONCLUSION

On three separate and independent grounds the order below was wrong. As a matter of procedure, it was unwarranted. It was based upon a complaint which failed to state a claim. And there was no jurisdiction over the persons of the petitioners. Any one of these three grounds should suffice to sustain a reversal of the order. To them may be added the special considerations of public policy involved in the institution of this suit at this time against corporations which are acting in accordance with the statutory policy of Allied nations to which they are subject and in accordance with executive agreements entered into with the government of the United States.

It is respectfully submitted (1) that the case should be remanded to the District Court with a direction to dismiss the complaint, or in the alternative (2) that the order appealed from should be reversed.

ROBERT T. SWAINE,
WM. DWIGHT WHITNEY,
Counsel appearing specially for Petitioners, De Beers Consolidated Mines, Ltd., Diamond Corporation Ltd., and Diamond Trading Company, Ltd.,
15 Broad Street,
New York, N. Y.

May 1, 1945

FILE COPY

Office - Supreme Court, U. S.
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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 1189

DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD., and DIAMOND TRADING COMPANY, LTD.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

SUPPLEMENT TO BRIEF FOR PETITIONERS

APPENDIX A

STATUTES
OF
THE UNION OF SOUTH AFRICA
1925
WITH
TABLES OF CONTENTS (ALPHABETICAL AND CHRONOLOGICAL) AND TABLES OF LAWS, ETC., REPEALED AND AMENDED BY THESE STATUTES.

PUBLISHED BY AUTHORITY

And Printed under the Superintendence of the Government Printer.

WETTEN
VAN
DE UNIE VAN ZUID-AFRIKA
1925
MET
TABELLEN VAN INHOUD (ALFABETIES EN CHRONOLOGIES GEORDEND) EN TABEL VAN WETTEN, ENZ., DOOR DEZE WETTEN HERROEPEN EN GEWIJZIGD.

GEPUBLICEERD OP LAST

En Gedrukt onder Toezicht van de Gouvernementsdrukker.

CAPE TOWN
1925

ACT No. 39 OF 1925.

[Date of commencement—29th August, 1925.*

ACT

To provide for the control of the sale and export of diamonds, and for the establishment of a diamond control board in the Union.

(*Assented to 27th July, 1925*)

(*Signed by the Governor-General in English.*)

BE IT ENACTED by the King's Most Excellent Majesty, the Senate and the House of Assembly of the Union of South Africa, as follows:—

Limitation of quantity of diamonds to be disposed of by producers.

1. (1) The Governor-General may determine—

(*a*) during the months of June and December in each year the maximum quantity in value of diamonds which during the ensuing period of six calendar months may be disposed of by all or any of the producers of diamonds within the Union;

(*b*) from time to time the quota or percentage in relation to the quantity referred to in paragraph (*a*) which may be disposed of by any such producer, and may vary and amend the same, but any such variation or amendment shall only take effect as from the first day of January next ensuing.

*See Proclamation No. 196 dated 21st August, 1925, published in *Gazette* No. 1501 of 28th August, 1925.

(2) The Minister shall give notice in the *Gazette* of any such determination, variation or amendment and in such notice shall state—

(*a*) where the determination is under paragraph (*a*) of sub-section (1) the maximum quantity in value of diamonds determined and where the determination is applicable only to certain producers the names of such producers;

(*b*) where the determination is under paragraph (*b*) of the sub-section (1) the quota or percentage in relation to the quantity in value determined under paragraph (*a*) of sub-section (1) which each producer may dispose of.

(3) Any producer who, during the period covered by any determination under sub-section (1) sells or disposes of diamonds of a greater quantity in value than the quota or percentage so determined in respect of himself, shall be guilty of an offence and liable on conviction to a fine not exceeding five hundred pounds plus the value of the diamonds unlawfully sold or disposed of: Provided that a *bona fide* pledge of any diamonds by way of security for advances for working expenditure shall not be deemed to be a disposal thereof.

Minimum prices for diamonds.

2. (1) The Governor-General may at any time by written notice to any producer determine the minimum prices at which diamonds or diamonds of any particular class determinable by reference to quality or weight or by the area of production or by any other circumstance may be sold or disposed of by such producer, during the period fixed in such notice which shall not extend for longer than the six calendar months succeeding the date of the notice: Provided that the Governor-General may at any time within such period by like notice vary and amend such minimum prices.

(2) When any minimum price has been fixed and determined in accordance with the provisions of sub-section (1), any producer who contrary to the terms of such notice and during the period fixed thereby sells or disposes of diamonds at a price lower than that so determined, shall be guilty of an offence and liable on conviction to a fine not exceeding five hundred pounds plus the difference in value between the minimum price determined and the price at which the diamonds were sold or disposed of.

Returns to be furnished by producer.

3. (1) The Minister may by written notice call upon any producer to furnish to him within a period of one month after the expiration of every period of six months referred to in sub-section (1) of section *two* of this Act a return showing—

(*a*) the total value of diamonds disposed of by him during the said period;

(*b*) the maximum, minimum and the mean average prices obtained.

(2) Any producer who when so called upon fails to comply with the provisions of this section, or who renders a return which is false in any material particular, shall be guilty of an offence and shall be liable on conviction to a fine not exceeding five hundred pounds or to imprisonment for a period not exceeding twelve months or to both such fine and imprisonment.

Establishment of Union Diamond Board.

4. (1) As from a date to be notified in the *Gazette* the Governor-General may establish a board called "The Union Diamond Board" (hereinafter referred to as "the Board") which shall consist of three members, one of whom shall be designated by the Governor-General as chairman and business manager. The conditions of such appointment

shall be notified forthwith to Parliament, if then in session, or, if not, within seven days after the opening of the session next ensuing.

(2) The rate of remuneration, the period of office and the conditions of appointment of members of the Board shall be fixed by the Governor-General at the time of appointment: Provided that, notwithstanding any period of office or other conditions so fixed, a member may at any time be removed at the discretion of the Governor-General.

(3) The chairman and members of the Board shall be selected for their knowledge and practical experience of the business of buying, selling and dealing in diamonds or of finance or public business.

(4) The members of the Board shall give their whole time to the work of the Board and shall hold no other appointment.

(5) A person shall be disqualified to be appointed or to remain a member of the Board if—

(*a*) within three years prior to his appointment he has been an unrehabilitated insolvent or has within such period compromised with his creditors or has within such period assigned his estate or if his estate is surrendered or sequestrated or if he compromises with his creditors or assigns his estate under the law relating to insolvency;

(*b*) he has been convicted of an offence and sentenced to imprisonment without the option of a fine;

(*c*) he holds directly or indirectly any share or interest in any undertaking for winning or dealing in diamonds or for cutting or polishing diamonds, or if within three months prior to

his appointment he has held directly or indirectly any such share or interest; or

(*d*) being a member of the Board, he engages in remunerative employment outside his duties as such.

(6) The salaries and other remuneration of the members of the Board and all expenditure incurred by it shall be defrayed from the revenues of the Board under this Act.

Board to be a body corporate.

5. The Board shall be a body corporate and shall under the name of the Union Diamond Board be capable in law of suing and being sued, and subject to the provisions of this Act, of purchasing or otherwise acquiring, holding and alienating property, movable or immovable, and of doing and performing all such acts and things as bodies corporate may by law do and perform.

Functions of the Board as to acquisition and disposal of diamonds.

6. (1) It shall be the function and duty of the Board, subject to the provisions of this Act to purchase, sell, deal in and hold stocks of diamonds and to export diamonds from the Union; when required by the Minister to advise him in respect of any determination to be made under section *one* or *two* of this Act or in respect of any other matter connected with the diamond trade; and at any time to furnish the Minister with any information he may require in regard to the business of the Board.

(2) The Board may, subject to the general or particular direction of the Governor-General as to the method and terms of obtaining all or any diamonds from all producers or any producer—

(*a*) purchase diamonds from producers as herein defined and also from any other producers of diamonds whether conducting diamond mining operations within the Union or elsewhere and sell the same, and for that purpose enter into agreements with any person producing diamonds for the purchase of the whole or any portion of his production for such period and at such prices as may be agreed upon;

(*b*) demand and receive diamonds from any producers named by the Board upon the instructions of the Governor-General for export and sale on their behalf; and the Board shall dispose of the diamonds received to the best advantage at its discretion subject to any direction by the Governor-General as to minimum prices, and the producers shall bear the costs of whatever nature in connection with the handling, carriage, freight, export, safe-keeping and sale of such diamonds and shall be liable for all risks attendant upon the handling and disposal thereof and for any remuneration to the Board or its representatives for such disposal on a scale or basis to be fixed by the Governor-General; and

(*c*) receive diamonds from producers as herein defined and also from any other producers of diamonds whether conducting diamond mining operations within the Union or elsewhere for export and sale as agents on their behalf and receive and pay over moneys received by the Board for such sale less commission and agency fees, and any carriage, freight, duty and other expenses incurred, and enter into agreements with any such producers in respect of such export, sale and charges.

(3) Any producer who refuses, or who without lawful cause fails to comply with any demand made by the Board under paragraph (*b*) of sub-section (2) for the delivery to the Board of any diamonds for export and sale on his behalf shall be guilty of an offence and liable on conviction to a fine not exceeding one thousand pounds or at the discretion of the court the value of the diamonds so demanded.

Powers of the Board.

7. For the purpose of the performance of its functions and duties the Board shall, with the authority of the Minister, have the following powers:—

(*a*) To appoint and employ such technical officers, agents, valuators, buyers, salesmen, secretaries, accountant, clerks or other servants as it may deem requisite and to dismiss them;

(*b*) to pay any person in its employ such salary, wages, or other remuneration as it may deem fit;

(*c*) to contribute to or to grant pensions or gratuities to persons in its employ or to dependents of such persons;

(*d*) to acquire by purchase, lease or otherwise, land or buildings for offices, strong rooms, sale rooms, or other accommodation within the Union or elsewhere necessary for the purposes of the Board;

(*e*) subject to the provisions of this Act, to receive, control and invest, and to open and operate banking accounts in respect of all moneys advanced by the Government on the authority of Parliament or received by the Board, its agents, bankers or salesmen, for the sale of diamonds or otherwise, in accordance with this Act, and to pay out moneys for the purchase of diamonds or otherwise from the funds of the Board, in accordance with this Act;

(*f*) to make advances from, or investments of, such moneys of the general fund to be established under section *thirteen* or investments of such moneys of the reserve fund to be established under section *fourteen* as may, in the opinion of the Board, not be required to meet current requirements, and

(*g*) to make advances to producers mentioned in section *six* (*2*) (*b*) at the time of the receipt and against delivery of diamonds to the Board at a rate per carat not exceeding the working costs per carat or not exceeding seventy-five per-cent of the value of the diamonds delivered whichever shall be the lesser but such advances shall only be made if in the opinion of the Minister they are necessary to meet the working expenses of the producer.

New agreements to be executed.

8. Every agreement made by the Board shall be deemed to be duly executed if signed by the chairman or by one or more members of the Board authorized thereto by resolution passed at a meeting of the Board.

Advances of money to the Board.

9. The Minister of Finance may, out of moneys provided by Parliament for the purpose, advance to the Board, on such conditions and at such rate of interest as he may deem fit, such sums as he may deem necessary to enable the Board to carry out its functions under this Act.

Books of account.

10. (1) The Board shall cause to be kept proper books of account which shall show a full and accurate record of all its transactions, assets and liabilities, and shall prepare yearly balance sheets made up to the thirty-first day of December, showing in all the necessary detail, its revenue and expenditure and its assets and liabilities.

(2) The Board shall within two months after the thirty-first day of December in each year transmit to the Minister to be laid before the Governor-General and published in the *Gazette* a statement of accounts showing—

(*a*) the profit and loss account for the preceding year; and

(*b*) such other details in regard to the Board as the Governor-General may require.

Every such statement shall be signed as correct by the chairman and members of the Board and shall be laid before Parliament within seven days after it has been so transmitted, if Parliament be then in session, or if Parliament be not then in session, within seven days after the commencement of its next ensuing session.

(3) In addition to the accounts in this section mentioned, the Board shall render to the Minister from time to time such other accounts, reports and statements as the Minister may require.

Minister's right of access to accounts, etc., of Board.

11. The Minister or any officer of the Public Service deputed by him shall have full access to all the accounts, documents and papers of the Board, and the Board and its officials shall at all times furnish to the Minister or such officer all such information as he may require.

Audit.

12. (1) The Governor-General may appoint two or more persons who publicly carry on the profession of accountants (hereinafter referred to as the auditors) to examine the accounts of the Board. Such examination is hereinafter referred to as the audit. The Board shall produce and lay before the auditors all its books and accounts with all vouchers in support thereof, and all books, papers

and writings in its possession or control relating thereto. The expenses of and incidental to the audit shall be borne and paid by the Board.

(2) For the purposes of the audit any such auditor may hear, receive and examine evidence upon oath (which oath any auditor is hereby empowered to administer) and by summons under his hand require such persons as he may think fit to appear personally before him at a time and place to be stated in the summons and to produce all such books and papers as may be necessary for such audit. Any person so required, who, without lawful excuse, fails to attend in obedience to such summons or who, having appeared, refuses to be examined on oath or to take such oath, or, having taken such oath to answer such questions as may be put to him or gives any false testimony shall be guilty of an offence and liable on conviction to a fine not exceeding twenty pounds: Provided that no conviction under this section shall be construed as exempting the person convicted from liability to do or perform the act, matter or thing required to be done or performed by him or from being successively convicted and punished for every distinct commission of the same offence.

(3) The auditors shall disallow every payment made without due authority according to law and surcharge the same on the person making or authorizing the illegal payment; and shall charge against any person responsible therefor the amount of any deficiency or loss incurred by the negligence or misconduct of that person or of any sum which ought to have been but is not brought into account by that person, and shall in every case certify the amount due from such person. Every sum so certified by the auditors shall be paid by such person to the secretary or other officer appointed by the Board within fourteen days after the same has been so certified and if not so paid may be recovered from such person as a debt by the auditors who shall be paid by the Board such portion of their reasonable

costs and expenses incurred in such proceedings as are not recovered by them from such persons. Any sum so recovered shall be paid to the secretary or other officer appointed by the Board.

(4) It shall be the duty of the auditors in addition to the ordinary duties of auditors, to certify not less than once in every year whether or not—

(*a*) the accounts of the Board are in order;

(*b*) the accounts present a true and correct view of the financial position of the Board and of its transactions and of the results of its trading;

(*c*) due provision has been made for the redemption and repayment of any moneys borrowed by or advanced to the Board;

(*d*) the value of the assets of the Board has been correctly stated;

(*e*) the sums to be set aside annually to the reserve fund under section *fourteen* have been set aside as prescribed; and

(*f*) all their requirements and recommendations as auditors have been complied with and carried out.

General fund.

13. The Board shall establish and maintain at a bank approved by the Minister a general fund into which all moneys received by the Board from whatever source shall in the first instance be paid; and out of which all payments by the Board shall be made, save such payments as are made out of the reserve fund under the authority of section *fourteen*.

Reserve fund.

14. (1) As soon as may be after its appointment the Board shall create a reserve fund to which shall be credited from time to time any nett profit earned by the Board.

(2) The reserve fund shall be applied by the Board in making good any loss or deficiency which may have occurred during any previous period as the result of its transactions.

(3) Whenever any balance remains in the reserve fund, after providing for the loss or deficiency aforesaid, so much of such balance as in the opinion of the Minister of Finance after consultation with the Board is not required to meet any probable contingent loss or deficiency shall be devoted by the Board to the repayment of any advances made to the Board by the Minister of Finance under section *nine*.

(4) If at any time the Minister of Finance, after consultation with the Board, shall be of opinion that the balance or any portion thereof remaining in the reserve fund after payment of such loss or deficiency aforesaid and completion of the repayment of advances made by him under section *nine*, is in excess of all probable demands upon such fund for the ensuing period of twelve months, Parliament may by resolution of both Houses, determine the manner in which such excess shall be disposed of.

Rewards and bribes.

15. (1) If the chairman or any member of the Board or any servant of the Board directly or indirectly receive any fee or reward from any person in respect of or in connection with any business of the Board, or be directly or indirectly interested or concerned in any contract or the profit or benefit of any contract made by the Board, save a contract of the kind referred to in sub-section (2) of section *four* hereof, he shall be guilty of an offence and liable on conviction to a fine not exceeding five hundred

pounds, or imprisonment for a period not exceeding five years or to both such fine and imprisonment.

(2) Any person who in respect of, or in connection with, any business of the Board bribes or attempts to bribe, or corruptly influences, or attempts corruptly to influence the chairman or any member of the Board or any servant of the Board, shall be guilty of an offence and liable on conviction to a fine not exceeding five hundred pounds, or imprisonment for a period not exceeding five years, or to both such fine and imprisonment.

Prohibition of sale, disposal or export of diamonds save through Board.

16. (1) The Governor-General may at any time after the appointment of the Board by notice in the *Gazette* declare a date after which it shall be unlawful for any producer indicated in such notice to sell or dispose of or export diamonds save to or through the agency of the Board and from and after that date so declared the sole and exclusive right of exporting diamonds from the Union shall vest in the Board: Provided that the Board may, subject to regulation, permit the sale, purchase or export of diamonds by any other person than the Board.

(2) After the date aforesaid any person who sells or disposes of diamonds otherwise than as stated in the last preceding sub-section, or attempts so to do, or who exports or attempts to export any diamonds from the Union except under permit from the Board, shall be guilty of an offence and shall be liable to confiscation of all diamonds so sold, disposed of or exported or attempted to be sold, disposed of or exported, and in addition to a fine not exceeding twice the value of the diamonds so sold, disposed of or exported or attempted to be sold, disposed of or exported or to imprisonment for a period not exceeding five years or to both such fine and imprisonment.

When agreements for sale of diamonds must be approved by Minister.

17. (1) The Governor-General may at any time by notice in the *Gazette* or by notice to any producer—

(*a*) declare that from and after a date fixed by him in such notice no agreement, entered into by any producer of diamonds in the Union or by those producers whose names are indicated in the notice, for the sale or disposal of diamonds produced by him or them, shall be valid unless and until approved by the Minister;

(*b*) declare that any agreement entered into prior to such notice and whether before or after the commencement of this Act by any producer of diamonds in the Union or by those producers whose names are indicated in the notice for the sale or disposal of diamonds after the thirty-first day of December, 1925, shall be invalid in respect of diamonds to be sold and delivered after the last-mentioned date unless and until approved by the Minister; and

(*c*) prohibit the export from the Union of diamonds which have not been sold or disposed of under agreement so approved by the Minister.

(2) Any agreement for the sale or disposal of the diamonds produced by any producer entered into upon or after the date fixed in any such notice save in accordance with the terms of this section shall be null and void and any producer or other person entering into such null and void agreement and attempting to act thereon or selling or disposing of diamonds under or in terms of any agreement made invalid by any declaration under sub-section (1) or exporting or attempting to export diamonds in contravention of this section, shall be guilty of an offence and liable

on conviction to a fine not exceeding five hundred pounds plus, in the case of any sale, disposal, export or attempted sale, disposal or export, the value of the diamonds which are the subject of the charge.

Conferences for the purpose of negotiating inter-producers' agreements.

18. (1) Notwithstanding anything in this Act contained, but without prejudice to the powers thereby conferred upon the Governor-General or the Minister, the Minister may from time to time convene conferences of such producers of diamonds as he may deem fit, for the purpose of enabling them to negotiate between themselves agreements (to be known as inter-producers' agreements) relating to all or any of the following matters—

(*a*) the maximum quantity in value of the diamonds produced by them which may be disposed of during any specified period;

(*b*) the quota or percentage of such quantity which may be disposed of by any such producer or any group of such producers during any specified period; and

(*c*) the minimum prices at which diamonds or diamonds of any particular class, determinable by reference to quality or weight or by the area of production or by any other circumstance, may be sold by each such producer or all of them during any specified period.

(2) The Governor-General may approve of any such agreement and may, as a condition of his approval, require—

(*a*) that in the sale of any diamonds the producers shall, other things being equal, give preference to purchasers domiciled in the Union; and

(*b*) that all or any particular sales of diamonds shall be by tender and that the method of inviting and dealing with tenders for the purchase of any diamonds and of ensuring secrecy in relation to such tenders shall be as prescribed by the Minister.

(3) Upon the approval by the Governor-General of any inter-producers' agreement the terms thereof, together with any condition attached thereto by the Governor-General under sub-section (*2*), shall be binding upon the parties thereto, and for the period of such agreement—

(*a*) the provisions thereof shall, in respect of the parties thereto in relation to any matter governed by the agreement, be deemed to be substituted for the corresponding provisions of this Act;

(*b*) the provisions of sections *one*, *two*, *six*, *sixteen* and *seventeen* of this Act shall in respect of the parties to the agreement in relation to any matter governed by the agreement cease to operate; and

(*c*) any party to the agreement contravening any provision thereof shall be guilty of an offence and liable on conviction, if the contravention was a sale or disposal by him of diamonds of a greater quantity in value than the quota or percentage fixed in the agreement in respect of himself, to the penalty prescribed in sub-section (3) of section *one*; if the contravention was a sale or disposal by him of diamonds at a price lower than that determined in the agreement, to the penalty prescribed in sub-section (2) of section *two*; and if the contravention was in respect of any other provision of the agreement, to a fine not exceeding five hundred pounds.

Regulations.

19. The Governor-General may make regulations not inconsistent with this Act—

(*a*) prescribing the conduct of meetings of the Board, and the methods of procedure thereof in the execution of its functions and duties;

(*b*) prescribing the methods of convening conferences under section *eighteen*, the procedure at such conferences, and the period within and manner in which any recommendations or result of any conference shall be conveyed to the Minister;

(*c*) generally for the better carrying out of the objects and purposes of this Act,

and may prescribe penalties for any contravention of or failure to comply with a regulation not exceeding, for a first offence, a fine of fifty pounds, and for a second or subsequent offence, a fine of one hundred and fifty pounds.

Saving as to alluvial diamonds.

20. Nothing contained in this Act shall apply to the sale, disposal or export of alluvial diamonds but the provisions of this section shall not prevent the Board from exercising the powers conferred upon it under paragraphs (*a*) and (*c*) of subsection (*2*) of section *six* of this Act in respect of such diamonds.

Definitions.

21. In this Act unless inconsistent with the context—

"diamond" means rough and uncut or partly cut or partly manufactured diamonds;

"Minister" means the Minister of Mines and Industries or any other Minister to whom the

Governor-General may assign the administration of this Act;

"producer", save in section *eighteen* hereof, means a producer of rough and uncut or partly cut or partly manufactured diamonds to whom a quota of diamonds available for sale is assigned under the provisions of section *one* of this Act.

Short title and commencement.

22. This Act may be cited for all purposes as the Diamond Control Act, 1925, and shall commence and come into operation on a date to be fixed by the Governor-General by proclamation in the *Gazette*.

APPENDIX B

IN THE

District Court of the United States

FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *Plaintiff*, v. DE BEERS CONSOLIDATED MINES, LTD., *et al*, *Defendants*.	Civil No. 29-446

MEMORANDUM FOR THE GOVERNMENT IN SUPPORT OF THE APPLICATION FOR A TEMPORARY INJUNCTION

Introductory Statement

On January 29th, the United States filed in this Court, a civil complaint charging nine corporate defendants and certain individuals with engaging in an unlawful combination and conspiracy in violation of the Sherman Antitrust Act and the Wilson Tariff Act, and seeking injunctive relief to prevent the continuation of the illegal practices charged in the complaint. At the same time, this Court signed a restraining order temporarily enjoining the corporate defendants from withdrawing their money from banks, or diamonds or other property from safe deposit boxes, and from withdrawing from the United States or selling or otherwise disposing of property belonging to the corporate defendants pending the determination of the issues of the case.

The Government is now moving for a temporary injunction to replace the temporary restraining order.

The restraining order was twice extended when the present motion was put over to afford the defendants additional time. The restraining order has been modified with the consent of the Government to permit payments for future purchases from defendants so as to facilitate the regular conduct of business by the defendants during pendency of the order.

I. The Complaint

To understand the problems growing out of this motion and the reasons why the Government is seeking this relief at the present time, it is necessary to refer briefly to certain facts alleged in the verified complaint, and the affidavit filed in support of this motion.

All of the corporate defendants are foreign corporations organized under the laws of foreign countries. They are charged with having engaged in a conspiracy restraining foreign commerce in this country in industrial and gem diamonds. As charged in paragraph 31 of the complaint, the combination and conspiracy has consisted of a continuing agreement between the defendants: (a) to prevent dealers and consumers in the United States from purchasing diamonds from the producers, (b) to prevent all sale or purchase of diamonds for export to or import into the United States except by purchase through Diamond Trading Company and except subject to terms and conditions set by defendants, (c) to prevent all persons in the United States other than certain favored brokers, dealers, and cutters from purchasing diamonds from the Diamond Trading Company, (d) to limit the production and supply of diamonds, (e) to limit and restrict the quantity of diamonds imported into the United States, and (f) to fix, stabilize, and enhance the prices at which diamonds are sold in the United States.

Substantially all diamond deposits are found in various parts of Africa. Defendants who would be restrained, under the proposed injunction, are foreign corporations who are in the business of mining diamonds or marketing them and all participate in the illegal arrangements charged in the complaint.

The complaint further alleges that the conspiracy has been carried on principally by having all producers of diamonds sell all their diamonds exclusively through a single selling agency, which is, at the present time, the defendant Diamond Trading Company.

The complaint further alleges that the defendants exercised the monopoly power acquired by the illegal conspiracy in a harsh and oppressive manner. Defendants exact from customers in the United States exorbitant prices on diamonds sold. They have set up a rather peculiar marketing system. The marketing arrangements differ, in the case of gem diamonds, from those of industrial diamonds.

Gem diamonds are customarily sold only four times a year at so-called "sights" held in London. Only a few selected dealers are permitted to attend these sights and the diamonds are sold in so-called series or lots which consist of a group of diamonds arbitrarily selected as to quality and size by the defendants. Each purchaser admitted to the sight must purchase diamonds in such series and they must purchase not less than £20,000 worth at each sight. If a dealer attends such a sight and does not purchase the minimum amount, he is excluded from all further sights. The dealers must pay for al diamonds purchased by them in advance.

Industrial diamonds, on the other hand, are sold in various ways. Some of them are sold at the sights in the same manner as are gem diamonds. Defendants, however, sometimes sell industrial diamonds directly to dealers in the United States on order by mail or cable. As in the case of gems, however, the dealer must pay for the industrial diamonds ordered in this way in advance of delivery. Pur-

chasers who have ordered by mail or cable are not permitted to inspect shipments before accepting delivery, or to refuse to accept shipments or to return them after inspection. Diamond Trading Company requires purchasers to buy unseen, and without warranty or representation, the industrial diamonds or boart shipped, and, having been paid, Diamond Trading Company will not take back the goods or make any adjustment. Diamond Trading Company has included in shipments of material sold as industrial diamonds material which cannot be used for the desired industrial purposes or for any purposes at all. Purchasers have no recourse and have no other source from which to buy. Purchasers are frequently prevented from buying the type of industrial diamonds needed for their or their customers' industrial operations and are permitted to buy only in series selected arbitrarily by Diamond Trading Company.

The complaint further alleges that the United States is the principal market for both gem and industrial diamonds, and that the restraints are imposed for the primary purpose of increasing the price of diamonds sold in or for export or import into the United States, and that the conspiracy has been put into operation and carried out in the United States in various ways set forth in the complaint.

Relief sought is the cancellation of the illegal arrangements, insofar as it affects our commerce and injunctive relief against their renewal.

The complaint therefore discloses an illegal combination directed against citizens of the United States, which charges them exorbitant prices and otherwise deals with them in a harsh and oppressive manner. Because of the monopoly power which the combination has acquired by this illegal arrangement, our people have no alternative except to submit to the exactions of this group to secure industrial diamonds which are now a vital industrial material.

Some of the widespread uses of this material in our industry are listed in the complaint in paragraph 21.

Industrial diamonds are, at the present time, a vital war material. This Government, from time to time, for military reasons, has desired to create a stockpile of industrial diamonds in this country. This Government, as a result of the conspiracy charged in the complaint, can only buy industrial diamonds in such amounts and at such prices as may suit the monopolistic purposes of these defendants. They would not allow this Government to establish a stockpile of industrial diamonds in the United States; the most they would do was to establish such a stockpile in Canada, which could be drawn on only under certain conditions.

II. The Need for the Preliminary Injunction

The complaint seeks relief which is of considerable importance to the people of this country and to the Government directly. The Government believes that unless the preliminary injunction now asked for is granted, this Court will be unable to grant effective relief in the event that the charges established in the complaint are proven to be true at the trial. Consequently, unless the injunction is granted, the defendants will be able to continue their illegal practices, our citizens will continue to be victimized, and the Government will continue to be dependent on and at the mercy of this ruthless monopoly for a vital war and industrial material.

The Government believes, on the allegations of the verified complaint and supporting affidavit, that it is clearly entitled to the injunction prayed for. If the Government after the trial of this case should secure a final judgment directing the defendants to terminate the illegal arrangements set forth in the complaint, both it and this Court will be confronted with the problem of making this decree effective. The only way in which a decree of the type sought in this case could be made effective by this Court would be through contempt proceedings, and contempt proceedings

could be made effective only through sequestration of the defendants' property within this country pursuant to Rule 70.

It seems clear that contempt proceedings would be completely ineffective in the situation presented without assets of defendants in this country. The defendants are foreign corporations; their mining operations are carried out in Africa; they have created a system of marketing diamonds which forces purchasers to go to London to acquire the diamonds; their principal officers reside abroad; the corporate defendants could terminate the authority of their officers who reside in this country. The foreign corporate defendants have little to fear from contempt proceedings and such proceedings will exert little compulsion upon them to comply with the terms of the decree.

The most effective, if not the only, way of securing compliance with any final judgment that may be entered in the case would be by sequestration of the assets of the corporate defendants that may be found in this country pursuant to Rule 70 of the Rules of Civil Procedure. If the Government should be compelled to wait until the final judgment and then attempt to sequester any property of the defendants in order to enforce obedience to the final judgment, it is extremely unlikely that there will be any assets of the foreign corporate defendants to sequester at that time. All of their property in this country consists of bank deposits and diamonds. These assets could be readily removed from the country. The past conduct and activities of the defendants render it extremely likely that they will withdraw their property from this country so as to avoid, if possible, the enforcement of any decree entered against them. Particularly is this course likely since a suit against defendants to enjoin violations of the Sherman Act can be maintained in no courts in the world except the federal courts in this country.

Defendants have taken various steps to evade the jurisdiction of our courts. They require purchasers to come to

London to purchase diamonds and to pay for them in advance; they insist that the stockpile of diamonds for our war effort be placed in Canada in their possession; they do business in the state of New York, but they have not qualified under the laws of that state.

These defendants owe no allegiance to our laws. They have formed a monopoly which gives them fabulous profits. To assume that they will not withdraw completely from this country and that they will voluntarily obey a decree of this Court which would destroy such monopoly, one must be extremely credulous. Any such assumption would be contrary to the facts of life. The Government must be, therefore, in a position to sequester the funds of these defendants to enforce any final judgment that may be entered in this case so as to secure its effective enforcement. Unless the temporary injunction prayed for is granted, it will suffer certain and irreparable harm. At the present time as a result of the restraining order, the Court has power to make its jurisdiction effective against all corporate defendants whose assets are affected. If the temporary injunction is granted that power is retained; if the injunction is refused and the restraining order dissolved, the Court's power is surrendered.

III. The Effect the Injunction Would Have Upon Defendants

The temporary injunction here applied for would in no way interfere with the present methods by which the defendants do business. It would not require any alteration in any of their methods of marketing diamonds. They could continue as they have in the past to sell diamonds abroad and compel purchasers to pay for them in advance.

The funds in this country form only a part of the total assets of the corporate defendants. They are all wealthy corporations and could readily post bond in lieu of the injunction. Moreover, they have readily available security

in the way of industrial diamonds which they could post in lieu of bond. As pointed out, defendants have in Canada a large stockpile of industrial diamonds which has been established to meet the war needs of American industry. The defendants could as readily hold this stockpile in this country. That is where it is to be used. To move that stockpile here would not inconvenience the defendants in the slightest. As a matter of fact, they could so easily thus provide security, any unwillingness on their part to transfer the stockpile, or a portion of it, from Canada to the United States would warrant an inference that they do not intend to comply with any judgment of this Court.

The only effect in practice upon defendants' business that the United States seeks by the present injunction is that defendants, during the litigation, continue their business here exactly as they have in the past, maintaining here the same assets. Any change by defendants in their course of business, now that this suit has been brought, could only be an act to avoid and defeat the jurisdiction of this Court. Therefore, all that the Government asks is that defendants be prevented from deliberately defeating the Court's jurisdiction.

Failure to grant the injunction would cause irreparable damage to the Government. Granting it will do no harm to the defendants. With the equities so balanced, familiar principles require that the injunction issue.

IV. The Authority in Support of the Injunction

A. The Court is authorized by statute to grant the injunction applied for.

Title 28 U. S. C. A., § 41 (23) provides that:

> The district courts shall have original jurisdiction as follows: (23) Of all suits and proceedings arising under any law to protect trade and commerce against restraints and monopolies.

This statute confers upon the United States District Courts the general powers of courts of equity, exerciseable in those suits in equity which the District Courts are authorized to entertain. The effect of the statute in this respect is thus described in *Crosley Corporation* v. *Hazeltine Corporation*, 122 F. 2d 927 (C. C. A. 3, 1941) as follows:

> . . . 'The remedies in equity in the courts of the United States are the same, and are to be granted and administered according to the principles, usages and remedies in equity in England at the time our government was established; and where, under the English chancery system, relief by injunction can be given, the same or similar relief may be given by the courts of the United States.' As Mr. Justice Stone said in Matthews v. Rodgers, 284 U. S. 521, 529, 52 S. Ct. 217, 221, 76 L. Ed. 447. 'The equity jurisdiction conferred on inferior courts of the United States by section 11 of the Judiciary Act of 1789, 1 Stat. 78, and continued by section 24 of the Judicial Code (28 U. S. C. A. § 41), is that of the English court of chancery at the time of the separation of the two countries.'

These principles have long been settled by the Supreme Court. See *Irvine* v. *Marshall*, 20 How. 564, 565 (1857); *Fitch* v. *Creighton*, 24 How. 162, 163 (1860); *Waterman* v. *Canal Louisiana Bank Co.*, 215 U. S. 43, 44 (1909); *Sprague* v. *Ticonic Bank*, 307 U. S. 164, 167 (1939).

The power to afford the remedies available in equity, thus given to federal courts by force of this general provision giving them jurisdiction over suits in equity, is not crystallized in the precise form administered by the English Court of Chancery in 1789 but remains alive and adaptable to the necessities of a given case. See the recent decision of the Supreme Court in *Sprague* v. *Ticonic Bank*, 307 U. S. 164 (1939), where a remedy was afforded as

"part of the historic equity jurisdiction of the federal courts," and it was held that plaintiff was not confined to the precise form of this remedy as previously recognized.

Rule 65 of the Rules of Civil Procedure, which is taken from Title 28 U. S. C. A., § 381, prescribes certain conditions regulating the issuance of injunctions.

Not only is the power to issue injunctions in aid of a party's suit in equity conferred upon the federal courts by virtue of the general language of the Judiciary Act conferring jurisdiction upon them, but Section 4 of the Sherman Act, in creating the special jurisdiction for suits in equity to "prevent and restrain violations" of the antitrust laws, expressly provides that the District Courts shall in such cases have the power to issue preliminary injunctions. This provision of the statute is the following:

> . . . Pending such petition and before final decree, the Court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

Again, in addition to the general powers of federal courts sitting as courts of equity, special provision is made by statute to enable such courts to exercise that jurisdiction. Title 28 U. S. C. A., § 377 provides as follows:

> . . . The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law. (R. S. § 716; Mar. 3, 1911, c. 231, § 262, 36 Stat. 1162.)

This statute and its effect have been characterized by the Circuit Court of Appeals in this Circuit in the case of *In re Nine North Church Street*, 82 F. (2d) 186, 188 (C. C. A. 2, 1936), as:

> An indefinite power to enjoin in aid of the court's jurisdiction is granted by Section 262 of the Judicial Code (28 U. S. C. A. Sec. 377).

As part of the relief prayed in the complaint here filed by the United States, the Government asks that defendants be perpetually enjoined from carrying out any agreements that prevent sales of diamonds by any of them for import into the United States, and that defendants be enjoined from entering into any agreement with any other defendant having the purpose or effect of limiting or restricting import of diamonds into the United States or of enhancing or influencing the price of diamonds in the United States. The complaint alleges that at the present time all defendants who operate diamond mines maintain agreements requiring them to sell all their diamonds exclusively through a single selling agency, Diamond Trading Company. To prevent continued restraint and monopolization of the foreign trade and commerce of the United States in gem and industrial diamonds, the final decree in this case, upon proof of the charges made by the complaint, will require defendants to cancel their existing exclusive selling agreements insofar as they prevent sales of diamonds direct from the producers to purchasers for import into the United States. Rule 70 of the Rules of Civil Procedure provides, *inter alia*, as follows:

> If a judgment directs a party . . . to perform any . . . specific act and the party fails to comply within the time specified, . . . on application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment.

The injunction sought by the present application would protect and preserve the power of this Court to afford to the United States the remedy upon final decree which Rule

70 affords. Against the foreign corporate defendants the Court's own process can command no other remedy. Without issuance of the temporary injunction, the remedy will be frustrated.

B. A court of equity will issue a preliminary injunction to prevent a party from defeating its jurisdiction.

It is fundamental that a court will exercise its inherent powers to protect and preserve its jurisdiction. The general proposition is stated in 21 C. J. S. Courts, Sec. 86, in these terms:

> A court has inherent power to maintain its jurisdiction and render it effective in behalf of litigants.

Issuance of an injunction to prevent a defendant from frustrating the jurisdiction of this Court sitting in equity was granted in the case of *Fisk* v. *Union Pacific Railroad Co.*, Fed. Cas. No. 4830 (1873). There the complainant filed a bill in equity against the Union Pacific Railroad Company and Credit Mobilier of America, a Pennsylvania corporation. Credit Mobilier commenced proceedings in a state court for the purpose of effecting its dissolution. The plaintiff prayed for an injunction to restrain it from any further attempts thus to evade the jurisdiction of the court. Blatchford, D. J., said:

> It cannot be permitted that, after jurisdiction in this suit, over this corporation has been acquired by this court, the corporation should be suffered to take steps to evade such jurisdiction by procuring its own dissolution.

The Supreme Court in *Kline* v. *Burke Constr. Co.*, 260 U.S. 228 (1922) restated the rule that the extraordinary writ statute Title 28 U.S.C.A., Section 377, authorized issuance of injunctions by a court of equity to protect its jurisdiction. The court declared well settled a striking in-

stance of the extent to which a court will go for this purpose. The plaintiff sought an injunction against proceedings in a state court. In terms this relief appears to be expressly prohibited by Section 379 of Title 28 of the U. S. Code, which provides that:

> The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state.

The Supreme Court stated that, nevertheless, the established rule is:

> But this section is to be construed in connection with §262, which authorizes the United States courts "to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." See Julian v. Central Trust Co., 193 U. S. 93, 112; Lanning v. Osborne, 79 Fed. 657, 662. It is settled that where a federal court has first acquired jurisdiction of the subject-matter of a cause, it may enjoin the parties from proceeding in a state court of concurrent jurisdiction where the effect of the action would be to defeat or impair the jurisdiction of the federal court.

Grant of a preliminary injunction against state proceedings to preserve a federal court's jurisdiction is also illustrated in *Looney* v. *Eastern Texas Railroad Company*, 247 U. S. 214 (1918). This was a suit by railroads to enjoin the Attorney General of Texas from instituting suits against them for complying with an order of the Interstate Commerce Commission. The plaintiff alleged that "it is necessary to protect the jurisdiction of this Court already acquired over the subject matter, and in order to afford these plaintiffs [the carriers] full and complete relief." A temporary injunction was awarded. The Attorney General of the State appealed to the Supreme Court. A motion to dismiss the appeal was granted. The court said (p. 221):

> The use of the writ of injunction by federal courts first acquiring jurisdiction over the parties or the subject matter of a suit, for the purpose of protecting and preserving that jurisdiction until the object of the suit is accomplished and complete justice done between the parties, is familiar and long established practice.

Issuance of preliminary injunctions of this nature for the purpose of protecting the Court's jurisdiction was characterized in *Boynton* v. *Moffat Tunnel Improvement District*, 57 F. (2d) 772 (C. C. A. 10, 1932), c.d., 287 U. S. 620, as follows:

> It is correctly argued that a court has inherent power to make such interlocutory orders as may be necessary to protect its jurisdiction, and to make certain that its eventual decree may not be ineffective.

Removal of property from the jurisdiction, where that would have defeated the jurisdiction of the court, was specifically enjoined in this state in the case of *Ward* v. *Arrendondo*, Hopkins (N. Y.) 213 (1824). Plaintiff there brought suit in the New York court for specific performance of a contract to convey land to the plaintiff. The land was located in Florida. The vendor was a Spanish subject then in Spain. When the suit was brought, a deed of the land by the vendor to the plaintiff was within the jurisdiction in the hands of an agent of the vendor. Plaintiff prayed an injunction against return of the deed to the vendor. The court held that the bill was in effect "one to enforce a specific performance of the contract, by laying hold of the deed which is within the jurisdiction of the court," and held that a preliminary injunction should be granted as prayed pending the trial on the merits.

This particular remedy of injunction against removal of property subject to the court's jurisdiction was held in *Iron City Savings Bank* v. *Isaacsen*, 158 Va. 609, 164

S. E. 520 (1932), to be properly granted for the purpose of giving the defendant opportunity to perfect personal jurisdiction over the defendant, and in order to protect the plaintiff against frustration of his remedy prior to acquisition of personal jurisdiction.

In creditors' suits seeking to set aside fraudulent voluntary conveyances, injunctions against removal of the property from the jurisdiction or other disposal of the property are granted as a matter of course. A simple contract creditor cannot always obtain this relief *In re North Church Street, Supra*, but that is because a court of equity has no jurisdiction to entertain a suit to collect a simple contract debt. In the case here at bar, the Court has jurisdiction in equity over the cause by force of Section 4 of the Sherman Act.

For injunctive relief to prevent defendants' destruction of the plaintiff's remedy by removal of the property from the jurisdiction or by otherwise disposing of it, see *Cobb* v. *Interstate Mortgage Corporation*, 20 F. (2d) 786 (C. C. A. 4, 1927); *Smith* v. *Bradlee*, 37 N. Y. S. (2) 512 (1942); *Allan* v. *Moline Plow Co.*, 14 F. (2d) 192 (C. C. A. 8, 1926).

On this application, the United States does not seek an injunction in order to obtain jurisdiction as in *Davis* v. *Foreign Bickford Co.*, 139 F. (2d) 624 (C. C. A. 8, 1944), but seeks to prevent frustration of the effective jurisdiction which, *prima facie* upon the basis of the allegations in the verified complaint and the facts appearing in the supporting affidavits, the court has obtained *in personam* over the foreign corporate defendants.

C. It is settled doctrine that in cases cognizable by courts of equity injunctions will be granted to maintain the status quo until the court has had an opportunity to decide the controversy, where, unless the injunction issues, the plaintiff will suffer irreparable injury and issuance of the injunction will not unduly harm the defendant.

Where plaintiffs in causes cognizable in equity seek a preliminary injunction, the balance of convenience between

the parties is the established test of the right to issuance of the injunction. In *Ohio Oil Company* v. *Conway*, 279 U. S. 813 (1929), plaintiff sued to enjoin collection of Louisiana taxes upon a challenge of constitutionality of the tax imposed. Plaintiff applied for a preliminary injunction upon the ground that collection of the tax by the Louisiana authorities during the pendency of the suit would injure the plaintiff irreparably, since under the Louisiana law there was no way to recover the taxes collected or paid under protest. The Supreme Court held that it was an abuse of discretion by the District Court to deny the application for the preliminary injunction. The test determining the propriety of issuing the preliminary injunction was thus defined by the court:

> Where the questions presented by an application for an interlocutory injunction are grave and the injury to the moving party will be certain and irreparable if the application be denied and the final decree be in his favor, while if the injunction be granted the injury to the opposing party, even if the final decree be in his favor, will be inconsiderable, or may be adequately indemnified by a bond, the injunction usually will be granted.

It was held in *Colorado Eastern R. R. Co.* v. *Eastern B. & W. R. Co.*, 141 Fed. 898 (C. C. A. 8, 1905) that the right to a preliminary injunction should be determined by the balance of convenience test, which was expressed in these terms:

> The granting of a temporary injunction does not determine the rights of the parties. The court need be satisfied no further than of a probable right and a probable danger, and that such right may be defeated without the interposition of a restraining

order, and that the granting of such order will probably be attended with less injury to the respondent than to the complainant.

Other cases supporting this doctrine are: *Elliott Addressing Machine Co.* v. *Addressing Typewriter Stencil Corporation*, 31 F. (2d) 282 (C. C. A. 2, 1929), citing with approval the *Colorado Eastern* case, *supra*; *Sinclair Refining Co.* v. *Midland Oil Co.*, 55 F. (2d) 42, 45 (C. C. A. 4, 1932); *Sanitary Reduction Works* v. *California Reduction Co.*, 94 Fed. 693, 696-7 (C. C. N. D. Cal. 1899); *Blount* v. *Societe Anomye du Filtre*, 53 Fed. 98 (C. C. A. 6, 1892); *City of Newton* v. *Lewis*, 79 Fed. 715 (C. C. A. 8, 1897).

Further decisions in which preliminary injunctions have issued to preserve the status quo in order to protect the plaintiff against irreparable injury and utter loss of remedy include the following:

Hoy v. *Altoona Midway Oil Co.*, 136 Fed. 483 (C. C. D. Del., 1905);

Georgia v. *Brailsford*, 2 Dal. 402 (1792);

Western Union Telegraph Co. v. *Industrial Commission*, 24 Fed. Supp. 370, 374 (D. C. D. Minn., 1930);

Denver & R. G. R. Co. v. *United States*, 124 Fed. 156 (C. C. A. 8, 1903);

Harriman v. *Northern Securities Co.*, 132 Fed. 464 (C. C. D. N. J. 1904);

Hadden v. *Dooley*, 74 Fed. 429 (C. C. A. 2, 1896);

American Smelting & Refining Co. v. *Bunker Hill & Sullivan Mining and Concentrating Co.*, 248 Fed. 172 (D. C. D. Ore., 1918).

As pointed out, the net effect of the injunction sought on this application would be merely to assure that the busi-

ness of defendants would continue to be conducted during the pendency of this suit in the same manner as it was carried on before the complaint was filed. The Government seeks only the aid of this Court to prevent the defendants from bringing about a change in their usual course of business for the deliberate purpose of withdrawing themselves and their assets from the effective jurisdiction of the court. At the present time, by virtue of the presence in this jurisdiction of assets customarily maintained by the defendants in this state in the regular conduct of their business, and under the present protection afforded the Government by the preliminary restraining order, the Court possess the power to make its decision of this controversy effective. With the dissolution of the restraining order and refusal of the injunction, the Court would surrender that power. The injury to the plaintiff is manifest. The defendants may defy the order of this Court with impunity and may continue the practices by which they have violated the laws of this land. On the other hand, grant of the injunction would not only impose no change in the course of defendant's business at this stage of the proceedings, not only would it throw no loss whatsoever upon them at this time, but defendants have it in their power to afford, with insignificant cost or burden to themselves, all the assurance and protection to the Government that the application for the injunction seeks to obtain. Defendants can readily afford this assurance either by giving bond to render themselves amenable to the process of this Court or by moving within this jurisdiction and maintaining here the stockpile of industrial diamonds which they now maintain in Canada for supply to American war industry.

We submit that the application for an injunction in this case meets to the fullest the test of balance of interests, and that in accordance with the authorities establishing the right to an injunction on this basis the injunction should issue as prayed.

D. The application for this injunction asks the court to exercise the equivalent of its intrinsic power as a court of equity to issue the writ of ne exeat, and exercise of this power against a foreign corporation is not subject to the limitations upon issuance of a writ against an individual.

Relief against a foreign corporation in a suit invoking the court's special statutory jurisdiction under the Sherman Act to enjoin the corporation's violation of the antitrust laws presents special problems. Effective remedy is not provided by the usual means for collection of claims against foreign corporations. There is no assured, effective remedy by ordinary process even though the Court has *in personam* jurisdiction over the corporate defendant. The foreign corporation may flee the effective jurisdiction of the Court by withdrawal of its assets. The statutory remedies of attachment have been drawn largely for the satisfaction of pecuniary claims. A judgment in a suit under the Sherman Act cannot with certainty be regarded as having that transitory character which renders other judgments based upon personal jurisdiction enforceable in foreign jurisdictions.

Since earliest times, in any suit properly cognizable in equity, where the personal presence of an individual defendant within the jurisdiction was necessary in order for the Court to afford effective relief, courts of equity have possessed and exercised the power to prevent the defendant's departure from the jurisdiction by issuance of the writ *ne exeat regno*. This power was not statutory in its origin but developed historically in chancery, and passed to and is possessed by the United States District Courts by virtue of their general investiture with the powers of a court of equity. We submit that since equity will grant this relief against an individual defendant, it should by use of its power to enjoin, afford the same relief against a foreign corporation. Particularly in the special exigencies of enforcement of a final decree, under Section 4 of the Sherman Act against a foreign corporation, the Court should by use

of its injunctive process fulfill the same need against a corporation as historically the Court always has fulfilled against individuals by the writ *ne exeat*.

Grant of an injunction prohibiting removal of assets by foreign corporate defendants, for the like purpose and to afford the like remedy as in the issuance of the writ *ne exeat*, is not subject to the objections founded upon abolition of imprisonment for indebtedness and the natural hostility to personal arrest or interference with personal movement. It is particularly free of these objections where, as in the facts of this case, the inconvenience inflicted is trivial compared with the injury to plaintiff that it avoids.

The nature and office of the writ of *ne exeat* were characterized by this Court in *In re Lipke et al*, 98 Fed. 971 (D. C., S. D. N. Y., 1900) as follows:

> . . . The writ of ne exeat is one of the orders or writs in familiar use in equity against one who "designing to avoid the justice and equity of the court, is about to go beyond sea, so that the duty will be endangered if he goes." 1 Wyatt, Prac. Reg. 289; 2 Story, Eq. Jur. p. 800. § 1470, note; 3 Daniell, Ch. Prac. (2d Am. Ed.) p. 1925.

See to like effect, *Murphy* v. *Patis*, 16 F. (2d) 515 (C. A., D. C., 1926); and *D. Ginsberg & Sons, Inc.* v. *Popkin*, 285 U. S. 204, 208 (1932).

In *Bushnell* v. *Bushnell*, 15 Barb. (N. Y.) 399, (1853), the court pointed out that issuance of this writ or exercise of the equivalent power must be afforded by a court of equity where necessary to prevent frustration of it's jurisdiction. Upon this proposition the court said:

> . . . At what particular period this writ was introduced into the practice of the English court of chancery, and to what particular purposes it was originally applied, may be involved in some obscurity; but none will deny that the power to issue and apply

it to those uses sanctioned by immemorial practice is an essential and indispensable attribute of the equity courts. Without its aid or that of some other equivalent process, the equitable jurisdiction vested in this court by the constitution must fail, and its functions in regard to many subjects of equitable cognizance become useless; for decrees and orders are senseless and unmeaning ceremonies when the tribunal which makes them is shorn of the power to carry them into execution. Upon the facts before the court in this action the statute authorizes a decree for a separation from bed and board forever, or for a limited time, together with such order and decree for the suitable support and maintenance of the wife by the husband, or out of his property, as the nature of the case renders suitable and proper.' But if the husband who owes and has the ability to make this just reparation to his injured wife, cannot be restrained within the jurisdiction of the court during the pendency of the litigation; if he may withdraw himself to the distant shores of the Pacific, there to enjoy his property, and his ample salary, at his leisure, while she remains to labor as a menial for subsistence, the provisions of the statute are in respect to her a mass of unmeaning words, and any decree which the court might make will be a barren and fruitless proceeding.

See the like relief granted under the New York statute in *Sturges* v. *Sturges*, 186 N. Y. S. 693 (1920).

The need which the writ of *ne exeat* answered and for which it was developed by courts of equity and granted by them is the same as the need for which application is made for this injunction. That need was characterized in *Lewis* v. *Shainwald*, 48 Fed. 492, 499 (C. C. D. Calif. 1881) in these terms:

> . . . The very object of this provisional remedy is to secure the presence of the party in order that the judgment may be executed,—in order that he may not be able to evade it.

Furthermore, the need served by this writ was regularly provided for in practice in the same manner as could be met upon this application by the defendants giving bond to make themselves amenable to the process of this Court. Thus, in *Mitchell v. Bunch*, 2 Paige 606, 619 (1831) it was said:

> Although in form it [the writ ne exeat] prohibits the defendant from going out of the jurisdiction of the court, yet it is a matter of course to discharge the writ, upon the party's giving security to answer the complainant's bill, where a discovery is necessary, and to abide such order and decree as may be made in the cause, and to render himself amenable to the process of the court, which may be issued to enforce the performance of the decree.

The writ of *ne exeat* issued where the plaintiff's bill sought to require performance by defendant of specific acts as well as where the proceeding was for enforcement of a pecuniary claim. Thus, it is said in Gibson's Suits in Chancery (1907) Section 865 as follows:

> It would seem that a ne exeat is a writ necessary for the purposes of justice when the defendant, by leaving the state, can defeat the power of the court to grant effectual relief, or evade the relief granted; especially when the relief consists in compelling the defendant (1) to execute to the complainant a deed for land, or other property, situate in another state, or * * * (4) to do some other act which the court could not effectually do by the direct and inherent operation of its own decree. The object of the writ is to enable the court to act upon the person of the defendant in such cases. 1 Barb. Ch. P. 647, 651.

652; 2 Dan. Ch. Pr. 1698, note; 2 Sto. Eq. Jur. §§ 1471, 1472, note.

Thus in *Hays* v. *Willie*, 11 Abb. Pr. (N. S.) 167 (1871), reversed on other grounds, 4 Daly 259 (1872), it was held in this state that a writ of *ne exeat* should issue against defendant threatening to appear as a theatrical performer in Boston contrary to a contract with plaintiff, for the violation of which plaintiff had brought suit praying an injunction. The court said:

> The return of *ne exeat* being issued in aid of the injunction, and being absolutely necessary to carry the order of the court into effect, the order to set it aside must be denied.

Furthermore, it was decided in England that in a case where, if the defendant departed the realm for other countries, he might lawfully in these countries injure the plaintiff in a manner which he could be prohibited from doing in England, the writ should issue for the very purpose of preventing this frustration of the plaintiff's remedy. *Mackintosh* v. *Ogilvie*, Dic. 119, 21 Repr. 213 (1747). In this case, Lord Hardwicke held as follows:

> Commissions of Bankruptcy equalize all creditors in England; and as the defendant is resident in this country, he is subject to the laws thereof, and I therefore will not permit any person to pass into Holland, or Scotland, where arrestments are allowed, to gain a total satisfaction of their debt in prejudice of the other creditors. For if he goes out of England, and out of reach of the process of this court, his agents may recover the debt, and he can never be accountable here; therefore let the writ continue.

In this state Chancellor Kent in an early decision acted upon the proposition that the exercise by a court of equity of the power to issue a writ of *ne exeat* was not limited to

precise rules but should be exercised where necessary to prevent a failure of justice. *Porter v. Spencer*, 2 John. Ch. 169 (1816). That case arose upon plaintiff's prayer for issuance of a writ in aid of proceedings at law seeking to enforce a purely legal demand. It is, of course, the usual doctrine that the writ issues only in cases cognizable in equity and not in matters actionable only in law. However, in this case, the defendant, who had already been arrested at law and had given bail, was about to leave the state leaving no property behind, and furthermore his bail, who was the plaintiff's father, had also disposed of his property in the state and was about to depart. The Chancellor held as follows:

> I place my interference on the necessity of the case. From the facts charged and sworn to, it appears to me that the remedy in the suit pending at law would be absolutely defeated without the interposition of this Court. The books assume and admit principles that will justify the allowance of the writ under the peculiar circumstances of the present case. The remedy sought is indispensable to prevent a failure of justice, and this creates a marked difference between this and the ordinary cases. I should think it would reflect discredit on the administration of justice, if the plaintiff could find no relief from the impending mischief arising from a failure of the remedy at law, by the immediate removal of the defendant and his bail. I have no option or discretion to refuse the writ, when a case is brought within the established rules of the Court.

The power exercised by equity in granting this relief is not atrophied or archaic but remains alive and adaptable to the necessities of the case. This was the ground of decision in the case of *Palmer v. Palmer*, 84 N. J. Eq. 350 (1915), decided in a jurisdiction still practicing in accordance with the principles and jurisdiction of the Courts of Chancery in

England (See *Ettelson* v. *Metropolitan Life Ins. Co.*, 42 F. S. 488, 491 (D. N. J., 1941)). The decision was thus expressed:

> Assuming that there is no precedent for the issuance of a ne exeat to keep a parent within this state to answer the exigencies of an order for access to a minor child by the other parent, no obstacle to the jurisdiction of this court to order the issuance of the writ is presented, for chancery will make a precedent to fit a case, novel in incident, which comes within some head of equity jurisprudence. *Earle* v. *American Sugar Refining Co.*, 74 N. J. Eq. 751 (at p. 761), and cases cited.

We submit that the decision of the United States Supreme Court in *Sprague* v. *Ticonic Bank*, *supra*, sanctioning a novel proceeding seeking the same practical result as afforded by historic remedies in equity, fully sustains the right to issuance of an injunction here as the equivalent of the historic writ *ne exeat* to meet the necessities of the case and to prevent a failure of justice. It is significant in this connection, we submit, that issuance of the writ *ne exeat* was in *Lewis* v. *Shainwald*, *supra*, expressly grounded upon the authority extended by Title 28 U.S.C.A., Section 377 to issue writs in aid of the court's jurisdiction. The court said:

> By Rev. St. § 716, it is provided that "the supreme court and the circuit and district courts shall have power to issue writs of *scire facias*. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." The writ of *ne exeat* is one of the writs necessary to the exercise of the present jurisdiction of the district court. * * * The authority of the district court to issue this writ is therefore unquestionable.

Grant of an injunction in this case restraining the foreign corporate defendants from withdrawing their assets from the United States or from depleting them is not subject to the limitations upon issuance of a writ *ne exeat*.

The only statutory limitation upon the writ, Title 28, U. S. C. A. § 376, is that the cause be cognizable in equity and that the defendant be shown to be designing quickly to depart from the United States. Here the court has cognizance of the cause in equity by force of § 4 of the Sherman Act. As to the intent to depart, the reality of the situation and the supporting affidavits present the equivalent of individual departure in the imminent withdrawal of corporate funds.

The rule of common law that *ne exeat* issued only in assertion of claims for amounts certain, or that could be made certain, *Ginsberg & Sons* v. *Popkin, supra* has been departed from where the object of the suit is to compel performance of specific acts and where the writ was necessary to prevent a failure of justice, as in *Hays* v. *Willio* and *Palmer* v. *Palmer, supra*.

These restrictions upon the remedy of *ne exeat*, and the principles arising from abolition of imprisonment for debt do not apply to the application for an injunction in this case. The injunction is not a writ of *ne exeat*. It does not arrest or molest any individual. It answers the need against the foreign corporate defendant which is met by *ne exeat* against the individual without inflicting personal seizure or confinement. Equity has historically exercised the power to prevent an individual's departure from the jurisdiction by the writ of ne exeat. The precise rules for application of that power against individuals have no application here. The court exercises through the writ *ne exeat* the power to prevent flight in order to protect and preserve jurisdiction. That same power should be exercised for the same purpose of protecting and preserving the effective jurisdiction of the court in this case and the injunction should issue as prayed.

Conclusion

We therefore submit that the facts of this case, the court's statutory authority, and the well-settled rule entitling complainant to an injunction in any cause in equity where, as here, it is necessary to prevent defeat of the court's jurisdiction and frustration of the complainant's remedy, as well as the time honored power of a court of equity to prevent a failure of justice through flight of the defendant during the pendency of the proceedings, fully warrant the issuance of the temporary injunction here applied for. Defendants will suffer insignificant inconvenience from this injunction as compared with the injury to the Government if it is denied. If the injunction should be denied, the foreign corporate defendants may flaunt the laws of this land and the statutory jurisdiction of this Court with impunity.

The Government has filed this suit to protect its citizens from the oppressive conduct of this combination of foreign corporations. We believe that unless this temporary injunction asked for is granted, the combination will be perpetuated. The complaint alleges arbitrary and unconscionable treatment of the people of this country by this combination. If the Government should find itself unable to protect itself and its citizens, we can only conjecture just what further indignities the cupidity of this combination may subject us to. The court in order to perform its functions and do justice between the parties, must maintain its ability to enforce its decrees. Well settled principles of equity require preservation of the status quo so as to avoid irreparable injury to the complainant.

For these reasons, we submit that the application for a temporary injunction should be granted.

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Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1190.

SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO and COMPANHIA DE DIAMENTES DE ANGOLA,

Petitioners,

vs.

UNITED STATES OF AMERICA

Respondent.

BRIEF OF PETITIONERS.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944.

No. 1190.

SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO and COMPANHIA DE DIAMANTES DE ANGOLA,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF PETITIONERS.

Opinion Below.

The opinion of the District Court has not been officially reported; it appears at pp. 97-99 of the Record.

Jurisdiction.

Jurisdiction of this Court is invoked under §262 of the Judicial Code (36 Stat. 1162, 28 U. S. C. §377). Review by common law writ of certiorari is sought in aid of the ultimate appellate jurisdiction of this Court conferred by §2 of the Expediting Act (32 Stat. 823, 15 U. S. C. §29).

Pursuant to the direction made at the time of the granting of the writ, the appropriateness of such review at the present stage of the case is discussed under Point I below.

Statement of the Case.

The order to be reviewed is one entered in the District Court on April 3, 1945 in a suit in equity brought by the United States against the petitioners and others for injunctive relief against alleged violations of the Sherman Act[1] and the Wilson Tariff Act[2] (R. 99-102). The order, which is styled a "preliminary injunction", requires that all the property of the petitioners found in the United States at the time of the institution of the action be sequestered and held during the pendency of the action and until the petitioners shall have complied with "all orders and decrees which may be or have been rendered against them in this cause" (R. 101 f. 301).

The purpose of the sequestration is to provide a fund to be held for an indefinite period of time as security for the performance of any decree that may be entered if the respondent is ultimately successful in the action. The order was entered before the determination of any of the issues in the action and before the petitioners' time to answer had expired. The petitioners have property in the United States affected by the order aggregating in value some $779,000 (R. 45-46, 49).

The business involved in the action is the production and sale of rough diamonds. The petitioner Societe Internationale Forestiere et Miniere du Congo (commonly known as "Forminiere") is a corporation organized under the laws of the Belgian Congo; the petitioner Companhia de Diamantes de Angola (commonly known as "Diamang") is a Portuguese corporation. They are engaged in the business of mining diamonds in Africa. The principal

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[1] 26 Stat. 209, 15 U. S. C. §§1, 2, 4.

[2] 28 Stat. 570, 15 U. S. C. §§8, 9.

ground of complaint is the allegation that the producers of diamonds in Africa, including the petitioners, have agreed to sell their entire output to a South African corporation known as Diamond Corporation, Ltd., one of the defendants in the action, and refuse to sell to others. This method of doing business is alleged to restrain the importation of diamonds into the United States and to enhance prices upon such importation (R. 12-13).

Simultaneously with the institution of the action—on January 29, 1945—the respondent filed its motion for the order under review (R. 34) and it also obtained *ex parte* a "temporary restraining order" substantially similar in effect to the "preliminary injunction" later entered (R. 30). After adjournments to permit the petitioners and other foreign corporate defendants to retain counsel in the United States, the motion came on for hearing before Honorable Samuel Mandelbaum, District Judge.[1]

The respondent's motion was based upon the allegations of the complaint, verified on information and belief by a Special Assistant to the Attorney General, and upon affidavits of the same Special Assistant alleging simply

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[1] The petitioners appeared specially for the purpose of opposing the motion and expressly reserved their right to move to dismiss the complaint on the ground that they were not subject to the jurisdiction of the Court (R. 91, 92). The determination of such a motion will be necessarily delayed because of the time involved in obtaining the affidavits and other evidence from the headquarters of the companies. During the argument of the motion for preliminary injunction the question of jurisdiction over the parties was adverted to and the respondent sought to make a preliminary showing on the point by submitting an affidavit of a Special Assistant to the Attorney General (R. 54). Although the petitioners were not prepared to present the matter fully they submitted certain affidavits in answer to that of the Special Assistant (R. 66, 71, 76, 82, 90, 91). The District Court did not pass upon the question of jurisdiction over the parties (R. 98) and petitioners now have pending their motion to dismiss and steps are being taken to obtain the necessary evidence for submission of those motions.

that "The principal businesses and activities of said defendants are carried on in foreign countries and they could quickly withdraw their assets from the United States and so prevent enforcement of any order or decree which the Court may render," and that "the foreign corporate defendants named herein have endeavored to avoid subjecting themselves to the jurisdiction of the courts of the United States by making their sales abroad only and requiring customers to pay in advance for all purchases" (R. 32, 33).

The property of the petitioners affected by the order consists of credits established with New York banks for the purpose of buying machinery and supplies to be used in the operation of mines in Africa, together with a quantity of such machinery and supplies which had been purchased but not yet shipped. In normal times the petitioners obtained the greater part of their mining equipment in Europe or Africa but because of war conditions it has been necessary for them to turn to the United States market for these materials and they have transmitted substantial funds to this country for that purpose (R. 45, 48, 79, 88). In the case of Forminiere, the bank credits affected by the order aggregate approximately $632,000, and the machinery and supplies purchased have a value of approximately $45,000 (R. 45-46). The bank credits of Diamang aggregate approximately $47,000, and the materials purchased amount to some $55,000 (R. 49).

This property is not in any way the subject matter of the action and the respondent does not contend that there is anything unlawful in either the ownership or the intended use of the funds and materials. The contention is rather, as stated in the motion, that "sequestration of said property is the only means of enforcing this Court's orders

or decree against said foreign corporate defendants" (R. 34).

The petitioners are suffering great and irreparable injury in being deprived of the use of these funds and materials. The machinery and supplies sought to be purchased in the United States are intended to be used for the production of industrial diamonds, which are important to Allied war production and for which there is now an unprecedented demand. Such purchases have been interrupted by inability to make use of the funds brought to the United States for that purpose. The fact that the order as it now stands does not apply to such funds as the petitioners may be able to bring to the United States after January 29, 1945, does not mitigate the hardship. Funds and property of great value have been rendered useless for an indefinite period, and the obtaining and transmission of dollar exchange in foreign countries is extremely difficult in time of war.

Summary of Argument.

As to the Writ.

The Court has power to review the order of the District Court under §262 of the Judicial Code, in the exercise of its ultimate jurisdiction to review decisions in anti-trust cases brought by the United States. The order is one which ought to be subjected to appellate review because of its serious effect upon the petitioners and because of the importance and novelty of the questions involved in the decision. Such review, to be effective, must be obtained at the present stage of the case, because the order will be beyond correction when the case comes to final decree. The only remedy is the common law writ of certiorari, unless it is to be held that an appeal will lie to

the Circuit Court of Appeals under §129 of the Judicial Code. Neither the Expediting Act nor the policy which it serves requires the denial of prompt appellate review of the order.

As to the Merits.

The order is not designed to protect or preserve the subject matter of the action or any right of the respondent and is merely a means of exacting from the petitioners security for the performance of the decree if the respondent ultimately prevails in the action. The order therefore performs the office of an attachment or sequestration rather than an injunction.

Under Rule 64 of the Rules of Civil Procedure the availability of such a remedy is governed by the law of the State where the action is pending (New York) in the absence of any Federal statute creating such a remedy. Neither the law of New York nor any Federal statute permits the requirement of security in such a case. The fact that the order is denominated a "preliminary injunction" does not enlarge the power of the Court because Rule 64 governs the requirement of security by attachment or sequestration "or other corresponding or equivalent remedies, however designated * * *." No precedent has been found in any court for such an order.

Even if the remedy were available upon a proper showing, the granting of it in this case would constitute an abuse of discretion because of the remote and fanciful nature of the reasons asserted for the application and the unwarranted injury which it imposes upon the petitioners.

The relevant parts of such statutes as are deemed to have an important bearing are quoted in the argument.

ARGUMENT.

POINT I.

Review of the order at this stage of the case by writ of certiorari under §262 of the Judicial Code is appropriate.

A. The Court has power to grant the writ.

The pertinent language of §262 of the Judicial Code (36 Stat. 1162, 28 U. S. C. §377) is as follows:

> "• • • The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

The issuance of such writs must, of course, be in the exercise of this Court's appellate jurisdiction. Such jurisdiction is defined by §2 of the Expediting Act (32 Stat. 823; 15 U. S. C. §29), which provides:

> "In every suit in equity brought in any district court of the United States under sections 1-7 of this title," [*i.e.* the Anti-Trust statutes] "wherein the United States is complainant, an appeal from the final decree of the district court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof: • • •"

Upon the construction of this Act stated in *United States* v. *California Cooperative Canneries*, 279 U. S. 553, 558 (1929), the Supreme Court is vested with the ultimate and exclusive jurisdiction to review such cases.

The power to issue the writ does not depend upon the existence of an appellate jurisdiction which can be "imme-

diately and directly invoked", but rather rests "upon the ultimate power" of this Court "to review the case itself", *Ex Parte United States*, 287 U. S. 241, 246 (1932). The issuance of the writ in this case enables the Court to "accelerate its own undoubted reviewing authority" and is therefore supported by the decision as well as by the dissenting opinion in *Ex Parte Peru*, 318 U. S. 578, 591 (1943).

B. The order is one which ought to be reviewed at the present stage of the case.

The order of the District Court deprives the petitioners of the use of three quarters of a million dollars for a period which will necessarily be protracted (R. 45, 46, 49); it interferes with the acquisition of materials and supplies which it is both lawful and desirable that the petitioners be permitted to acquire (R. 46, 47, 49); and it may subject the petitioners to substantial liabilities to suppliers with whom contracts have been made for the manufacture of machinery and equipment (R. 46, 47, 49). Judicial action having such drastic consequences ought, in the interests of justice, to be subjected to prompt appellate review.

The questions presented are not merely of serious concern to the petitioners; they are important questions of Federal law which may affect the course of a considerable volume of litigation, and as to which the decision of the District Court appears to be inconsistent with the Rules of Civil Procedure and with the decisions of other Federal courts in similar matters. The order requires, in effect, that parties against whom no finding has been made and who have not even had an opportunity to answer the complaint shall hold all of their assets found within the jurisdiction at the time of the institution of the action as security for the performance of the final decree to be entered if the respondent is ultimately successful in the action. As will be shown

below, such an order is without precedent in any of the courts of this country or of England and relief of a comparable nature has been denied by other Federal courts. If such an order may be made upon the mere assertion that defendants are non-residents and could withdraw their assets, it will doubtless be sought in many cases of both a public and private nature; see, for example, *Guth* v. *Graves*, 44 F. Supp. 851, 854 (S. D. N. Y. 1942) where the Court said: "Certainly, if injunctions may be issued to insure the payment of judgments at the end of litigation, such relief would be sought in every case."

Postponement of review of the order until after final decree would be in fact a denial of any review at all. If the order remains in effect until final decree it will have spent its force and the damage done by it will be beyond repair. This is true of most preliminary injunctions and is the reason why Congress has provided generally for immediate appeals from interlocutory orders granting preliminary injunctions (Judicial Code, §129, 26 Stat. 828, 28 U. S. C. §227). As was stated by this Court in *Cobbledick* v. *United States*, 309 U. S. 323, 324 (1940), the requirement of finality as a prerequisite to appeal is departed from in such a case because "observance of it would practically defeat the right to any review at all."

C. Review of the order at this time would not be inconsistent with the provisions of the Expediting Act or the policy underlying that Act.

Prior to the adoption of the Expediting Act the parties to an equity suit brought under the anti-trust laws by the United States had the right of appeal to the Circuit Court of Appeals from the final decree. Judicial Code §128 (26 Stat. 828, 28 U. S. C. §225). They also had the right of appeal, to the same court, from interlocutory orders or

decrees granting or denying preliminary injunctions. This latter right is set forth in §129 of the Judicial Code (26 Stat. 828, 28 U. S. C. §227) applying to civil actions generally as follows:

> "Where, upon a hearing in a district court, or by a judge thereof in vacation, an injunction is granted, continued, modified, refused, or dissolved by an interlocutory order or decree, or an application to dissolve or modify an injunction is refused, • • • an appeal may be taken from such interlocutory order or decree to the circuit court of appeals; and sections 346 and 347 of this title shall apply to such cases in the circuit courts of appeals as to other cases therein. The appeal to the circuit court of appeals must be applied for within thirty days from the entry of such order or decree, and shall take precedence in the appellate court; and the proceedings in other respects in the district court shall not be stayed during the pendency of such appeal unless otherwise ordered by the court, or the appellate court, or a judge thereof. The district court, may, in its discretion, require an additional bond as a condition of the appeal."

The Expediting Act (p. 7, *supra*), designed to eliminate delay in the determination of anti-trust cases brought by the United States, made two direct and specific changes in the law relating to appeals. It substituted a direct appeal to this Court from the final decree of the District Court in the place of the right of appeal to the Circuit Courts of Appeals which theretofore existed, and it shortened the time within which such appeals might be taken.

Since the Expediting Act dealt expressly with "an appeal from the final decree of the District Court", it may be doubted whether it had the effect of repealing by impli-

cation §129 of the Judicial Code which related to appeals from preliminary injunction orders. There is no apparent reason why such repeal should have been intended because appeals under §129 of the Judicial Code would not have the effect of impeding the progress of the main case. That section specifically provided that the appeal from an interlocutory order of injunction should not operate as a stay of proceedings in other respects in the District Court unless such a stay was specifically ordered, and it contained its own provisions for expediting such appeals by limiting the time within which they might be taken and by directing that they be given precedence over other matters in the appellate court. See *Ex Parte National Enameling & S. Co.*, 201 U. S. 156, 161-2 (1906).

In *United States* v. *California Coöperative Canneries*, 279 U. S. 553 (1929), the question of partial repeal of §129 of the Judicial Code was not before the Court and the order there being considered was one which probably would not have been appealable prior to the passage of the Expediting Act. Mr. Justice Brandeis, writing for the Court, stated this generalization as to the effect of the Act:

> "Thus, Congress limited the right of review to an appeal from the decree which disposed of all matters, see *Collins* v. *Miller*, 252 U. S. 364; and it precluded the possibility of an appeal to either court from an interlocutory decree" (279 U. S. 558).[1]

This construction of the Act gives it a more far-reaching effect than is required either by its explicit provisions or by its underlying purposes. We therefore suggest that, unless the question is regarded as closed, there is ground

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[1] See also *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U. S. 137 (1944); *Missouri-Kansas Pipe Line Co.* v. *United States*, 108 F. (2d) 614 (C. C. A. 3d, 1939), cert. den. 309 U. S. 687.

for holding that an appeal from preliminary injunction orders will lie to the Circuit Court of Appeals notwithstanding the provisions of the Expediting Act.

If this view be incorrect, we then have the question whether the Expediting Act repealed *pro tanto* not only §129 of the Judicial Code but also §262 thereof so as to impair the power of this Court to issue writs to review interlocutory orders in aid of its appellate jurisdiction. This would be carrying the Expediting Act far beyond its reasonable intendment. If the effect of the Act has been to vest in this Court the sole and exclusive appellate jurisdiction in equity suits brought by the United States under the Anti-Trust Law, then there is stronger necessity for the preservation of the power of this Court to issue writs under §262 than there would be if there remained some appellate jurisdiction in the intermediate courts. Repeals by implication are never favored, and this doctrine applies with particular force in questions as to the jurisdiction of an appellate court to issue writs of certiorari in the interests of justice. *Ex parte Peru*, 318 U. S. 578, 585 note 4 (1943). See also HARRIS, LAW OF CERTIORARI (1893) 4, 5.

There are compelling reasons why the power of the Court under Section 262 of the Judicial Code should be exercised in this case, even if the Expediting Act be construed as precluding any appeal until after the decree finally disposing of the case. The order of the District Court is designed to deprive the petitioners of the use of their property until final decree. The invasion of right involved in the order is that deprivation. If review is postponed until after final decree there will be nothing that any appellate court can do to correct the error. The case, therefore, is unlike *Roche* v. *Evaporated Milk Ass'n.*, 319 U. S. 21 (1943), because in that case the error, if any, involved in the interlocutory rulings could be fully corrected

upon the statutory appeal from the final judgment. Another important difference is that the extraordinary review sought in the *Roche* case would necessarily interrupt the progress of the case, which is not true of the writ now before the Court.

The writ of certiorari was historically used "in furtherance of justice" to provide review where the ordinary remedy of appeal or writ of error was unavailable or inadequate. *In Re Chetwood,* 165 U. S. 443, 462 (1897). For an instance in State practice of the use of certiorari to review an interlocutory order in a situation where the statutory right of appeal from the final decree would be too long postponed to be effective, see *Hyde* v. *Superior Court,* 28 R. I. 204, 66 Atl. 292 (1907) as explained in *MacKenzie & Shea* v. *Rhode Island Hospital Trust Co.,* 45 R. I. 107, 122 Atl. 774 (1923).

POINT II.

The order of the District Court exacting security from the petitioners for the performance of a possible future decree was beyond the powers of a Federal court of equity.

Although the order of the District Court is denominated a preliminary injunction, the respondent does not deny that the order is in substance and effect a requirement that the petitioners furnish security for the performance of any decree which may ultimately be entered in the action. The property of the petitioners is not the subject matter of the action; and the order is therefore not designed to preserve or protect that subject matter. The possession and use of the property is not claimed to be unlawful; and the order is therefore not intended to prevent and restrain

violations of law. The true purpose and effect of the order are found in its own requirement that the property of the petitioners be held "until this case has been finally determined and said foreign corporate defendants have complied with all orders and decrees which may be or have been rendered against them in this cause * * *" (R. 101).

The availability of remedies for securing satisfaction of a judgment is governed by Rule 64 of the Rules of Civil Procedure, as follows:

> "At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action."

A. Neither the law of New York nor any Federal statute permits the seizure or impounding of property in an action in equity as security for a decree which may be entered.

The process provided by the law of New York for obtaining security prior to judgment in an action is the

warrant of attachment. This remedy is permitted only in actions brought solely for the recovery of a sum of money. The New York Civil Practice Act, Section 902, provides that

> "A warrant of attachment against the property of one or more defendants may be granted upon the application of the plaintiff, as specified in the next section, in any action for the recovery of a sum of money only."

It is well settled that attachment will not lie in an action of an equitable nature, whether or not the defendants are non-residents. *Thorington* v. *Merrick*, 101 N. Y. 5 (1885).

The respondent's motion seeks to justify the requirement of security by the assertion that "sequestration of said property is the only means of enforcing this Court's orders or decree against said foreign corporate defendants." But sequestration is not available under the laws of New York prior to an adjudication of liability. There is no statute permitting sequestration in such a case as the present one, and that remedy would be available, if at all, only as a contempt process, to be employed after some order or decree has been entered against the defendant and he has failed to obey it. See *Hosack* v. *Rogers*, 11 Paige 603 (1845). This is in accordance with the universally accepted principles of chancery both in England and in this Country. See *Pratt* v. *Inman*, 43 Ch. Div. 175, 179 (1889); *Hulbert & Crowe* v. *Cathcart* [1894] 1 Q. B. 244; *Skinner* v. *Educational Pictures Securities Corporation*, 14 Del. Ch. 417, 129 Atl. 857 (1925); *Roberts* v. *Stone*, 18 Mo. 481 (1853).

The matter of security for performance of a decree is not dealt with in any Federal statute. The only provision for either attachment or sequestration in civil actions is

that found in Rule 70 of the Rules of Civil Procedure, which provides in part:

> "If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment."

This rule is similar to the former Equity Rules 7 and 8 under which it was held that

> "* * * there must have been a judicial act of some kind determining some issue in the case before such a drastic writ may be allowed." *Ross* v. *Grafton Power Co.*, 60 F. (2d) 663 (D. Vt., 1932). See to same effect *Martin* v. *James B. Berry Sons' Co.*, 83 F. (2d) 857 (C. C. A. 1st, 1936).

B. The power of the Court is not enlarged by describing the exaction of security as a "preliminary injunction".

It is contended by the respondent that the requirement of security is justified by reason of the fact that the order is cast in the form of an injunction rather than an attachment or sequestration. This contention assumes that form is more important than substance and that the limitations and safeguards placed around these drastic remedies may be circumvented by the careful use of words. The answer is provided in the language of Rule 64 itself which provides that the remedies for seizure of person or property for the purpose of securing satisfaction of a judgment in-

clude not only attachment and sequestration but also "other corresponding or equivalent remedies, however designated * * *."

The matter was well stated as follows by Chancellor Wolcott in *Cities Service Co.* v. *McDowell*, 13 Del. Ch. 109, 116 Atl. 4, 9 (1922), where an attempt was made, upon the institution of an equity suit, to obtain an injunction against the transfer by the defendant of property which was not the subject matter of the suit:

> "After all, though the complainant disclaims his contention to be such, the real question presented is this, viz.: May the writ of injunction be employed in equity to accomplish the same purpose which is served by the writ of foreign attachment at law?
>
> * * * * * * *
>
> "Injunctive relief may be granted on various grounds. In a general way, it may be said that two classes of cases call for its application: First, where, for instance, irreparable injury is threatened, or some forbidden act is about to be done by corporate or municipal officers, in cases of which kind the preventive aid of equity is the ultimate relief sought; and second, where the injunction is sought not as the ultimate and only relief, but in aid of some primary equity which the bill sets up.
>
> "This case clearly does not fall in the first class; and as to the so-called innocent shares of stock, the case clearly does not fall in the second class, for with respect to these the bill sets up no equity whatever. No lien is charged against them and no fraud is imputed to them. They are in no wise related to the controversy. They can be of no possible concern in this suit until the stage thereof is reached where a decree is made. At that time, if the decree should be for the complainant, these so-called innocent shares might in some way be sought in satis-

faction of the decree. Assuming that this could be done, then the injunction in equity would be used similarly to and as broadly as the mesne process of attachment at law. At least in substance it would be so. The writ of injunction cannot be used in this manner. Its issuance must be predicated on the existence of some equity. The anticipatory desire to aid the enforcement of a possible future decree, standing alone, has never been recognized as constituting such an equity."

As was stated in the foregoing opinion, one of the principal uses of the writ of injunction is to grant, *pendente lite*, relief of the character to which the complainant asserts that he is ultimately entitled. Such a case was *Ohio Oil Co.* v. *Conway*, 279 U. S. 813 (1929). Another recognized office of a preliminary injunction is to protect and preserve the subject matter of the suit until final adjudication. Such a case was *Deckert* v. *Independence Shares Corporation*, 311 U. S. 282 (1940), where the complainants asserted a trust upon a fund and sought to have the fund administered in equity for the benefit of the alleged *cestuis*. In that case a preliminary injunction against dissipation of the alleged trust fund was granted.

These uses of preliminary injunction in chancery practice are an exercise of the court's power to prevent infringement of some *right* of the complainant: "to protect any right of property, to enforce any obligation, or to prevent any wrong, * * *" (POMEROY, EQUITY JURISPRUDENCE, 5th Edition, 1941, Vol. IV, Sections 1338 et seq.). The chancery jurisdiction does not go to the length of creating a new right in the complainant, such as the right to have security for the performance of a decree *in personam* that may ultimately be entered.

Section 4 of the Sherman Act, (26 Stat. 209, 15 USC § 4) after providing that "the several district courts of the United States are invested with jurisdiction to prevent and restrain violations of", the substantive provisions of the Act, authorizes the Court at any time to "make such temporary restraining order or prohibition as shall be deemed just in the premises." Preliminary injunctions issued under this Section have uniformly been designed to "prevent and restrain violations" pending final determination of the issues, and there is no precedent for the extension of such injunctions to uses other than those sanctioned by equitable principles.

Similarly, the issuance of writs under Section 262 of the Judicial Code has uniformly been in accordance with "the usages and principles of law," as is explicitly required by that Section. The use of any writ, whether it be denominated attachment or sequestration or injunction, to exact security for the performance of a decree possibly to be entered in a suit in equity, would be contrary to the usages and principles of law.

The respondent has not been able to cite a single precedent, and we have found none, in any of the Federal or State courts or in the courts of England for the requirement of security by injunction against the transfer of property which is not itself the subject matter of the action. Every attempt to obtain such relief has been denied. See *Wahlgren* v. *Bausch & Lomb Optical Company*, 77 F. (2d) 121 (C. C. A. 7th, 1935); *Guth* v. *Groves*, 44 F. Supp. 851 (S. D. N. Y., 1942); *Campbell* v. *Ernest*, 64 Hun 188, 19 N. Y. S. 123 (1892); *Platt* v. *Elias*, 101 App. Div. 518 (1905); *Nelson* v. *Smith*, 157 Ore. 292, 69 Pac. (2d) 1072 (1937).

POINT III.

Even if such a remedy were available, the granting of it in this case would constitute an abuse of discretion.

The order of the District Court was made upon the scantiest showing of any need therefor and with inadequate consideration of the consequences to the petitioners. For this reason the order would be erroneous even if it were within the proper scope of the equitable powers. The respondent submitted a complaint verified on information and belief by one who admittedly did not have knowledge of the facts, and affidavits which contained nothing more substantial than the assertion that the petitioners were foreign corporations and could withdraw their assets from the United States. Upon this showing it was said that the respondent would suffer irreparable injury if the petitioners were not required to immobilize all their assets in the United States for an indefinite period, because otherwise a decree against the petitioners could not be enforced.

Upon analysis it will be seen that the respondent is dealing with an entirely remote and conjectural contingency. If the petitioners are found to be subject to the jurisdiction of the District Court; if their methods of doing business are ultimately held to violate the laws of the United States; if they fail to obey any decree that may be entered against them; if fines are thereafter levied against them in contempt proceedings; and if those fines remain unpaid—then the respondent wishes to be assured of the existence of assets in this country which may be levied upon in satisfaction of the fines.

The assumption that the respondent will ultimately prevail in the action is subject to the gravest sort of doubt.

The petitioners produce diamonds in Africa and sell them to a South African corporation which operates in England. It is charged that they have sought to refrain from doing business within the United States, but that their business policies have affected the interests of the United States which is an important user of diamonds. A basic question exists whether the activities of these companies in Africa and Europe are subject to the laws of the United States. This question should, of course, be determined upon evidence and not upon the conclusory allegations and characterizations of the complaint. It is apparent, however, that the case is not one in which the ultimate success of the respondent is to be easily assumed.

A further fact bearing upon the reasonableness of the assumption that the respondent will have to seek means of collecting fines imposed against the petitioners in contempt proceedings is that the petitioners are not outlaws; they are substantial and highly reputable enterprises. Forminiere is largely owned by the Government of the Belgian Congo, which holds 55% of its outstanding stock (R. 84).* The Government of Portugal holds a substantial interest in the profits of Diamang (R. 87). Corporations of such standing and operating under such auspices are not likely to flout decrees validly entered against them.

In order to provide the security which the respondent seeks, the petitioners are to be deprived of the use of property valued at over $700,000 for a considerable period of time. This property is lawfully possessed and the respondent claims no interest in it. Use of the property by the petitioners would violate no law and would impair no right of the respondent. Inability to make use of this

* The respondent's allegation that this is non-voting stock (R. 54) appears to be incorrect (R. 84).

large fund has interrupted important and desirable purchases and may subject the petitioners to substantial liabilities.

The respondent seeks to belittle the injury being done to the petitioners by asserting that a surety bond could be posted in substitution for the impounded fund. If the respondent is not entitled to the injunction, it is obviously not entitled to a bond. Apart from this, the practical difficulties under present conditions in the way of furnishing such an unusual undertaking are apparent, and neither the parties nor the District Court thought it worthwhile to make any provision in the order for the posting of a bond.

The effect of the order therefore is to impose a heavy penalty upon parties who have not been found to have violated any law, in order to provide against a remote and uncertain contingency. Such an imposition has no precedent or justification in our law.

Conclusion.

The order of the District Court should be reversed.

Respectfully submitted,

JOHN M. HARLAN,
JOHN E. F. WOOD,
Counsel for Petitioners.

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Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1190.

SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO and COMPANHIA DE DIAMANTES DE ANGOLA,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF OF PETITIONERS.

JOHN M. HARLAN,
JOHN E. F. WOOD,
Counsel for Petitioners.

Supreme Court of the United States

OCTOBER TERM, 1944.

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UNITED STATES OF AMERICA,

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REPLY BRIEF OF PETITIONERS.

I.

Issuance of the Writ of Certiorari under Judicial Code, Section 262, is not limited to cases involving jurisdiction or questions of public importance.

As we read the Government's brief, the power of the Court to issue the writ is not questioned. The suggestion, however, that this power should be used only in cases where the lower court has exceeded its jurisdiction, or in cases affecting major governmental policy, would have the effect of artificially curtailing the appellate powers which this Court has exercised and which Congress clearly intended to be exercised under the statute.

Ex Parte Peru, 318 U. S. 578, involved no question of jurisdiction (318 U. S. 587) and although issuance of the writ of prohibition in that case was based upon the ground that the dignity and rights of a friendly sovereign state were involved, the Court quoted with approval the statement in *Ex Parte United States*, 287 U. S. 241, 248-49, that the power to issue writs under Judicial Code Section 262, would be exercised both where a question of public importance is involved, and "where the question is of such a nature that it is peculiarly appropriate that such action by this Court should be taken."

The issuance of such writs is a matter resting in the sound discretion of the Court, and where, as here, ordinary appellate procedure is inadequate, and review by this method "is reasonably necessary in the interest of justice" the issuance of the writ is appropriate. *Adams* v. *U. S. ex rel. McCann*, 317 U. S. 269, 274.

Section 262, in authorizing the issuance of "all writs," includes certiorari as well as prohibition and mandamus. The writ of certiorari was never necessary to correct excesses of jurisdiction, which could be accomplished by a writ of prohibition, or to compel the performance of ministerial acts which could be required by the writ of mandamus. Certiorari was designed to perform a broader supervisory function "to the end that the party may have the more sure and speedy justice * * *" (Bacon, *Abridgement of the Law*, Vol. 2, p. 162).

II.

The order of the District Court cannot be justified as a means of protecting the jurisdiction of the Court.

The respondent refers to the power of a District Court to issue preliminary injunctions against the maintenance of actions in other courts, in certain circumstances, "to protect and preserve its jurisdiction," citing *Looney* v. *Eastern Texas R. R. Co.*, 247 U. S. 214, and *Klein* v. *Burke*

Construction Co., 260 U. S. 228. Such cases present no analogy to the one now before the Court because the order in this case has no relation to the jurisdiction of the Court to hear and determine the issues submitted to it. Jurisdiction over the person of the corporate defendants has been questioned but this issue will be determined by the District Court in accordance with prescribed procedure, as will all other questions arising in the case.

The desire to have assets available at some future date out of which fines for contempt of court may be collected has nothing to do with the preservation of the jurisdiction of the Court. No matter what form of words is contrived to describe the order entered in the District Court, it remains in substance and in fact an order for the requirement of security for the performance of a possible future decree, and is governed by Rule 64 of the Rules of Civil Procedure. As we have shown in our main brief, an injunction against the transfer of assets in order to accomplish this purpose has never been countenanced.

The case of *Zenith Carbureter Co.* v. *Stromberg Motor Devices Co.*, 270 Fed. 421 (C. C. A. 7th), which is relied upon by the respondent, does not support its position. In that case, after a decree had been entered establishing the liability of the defendant to the plaintiff, and referring the matter to a master for an accounting as to the precise amount of the liability, an injunction was entered against the disposition of a fund which it was contended was impressed with a trust in favor of the plaintiff. This was, therefore, the familiar case of a court preventing dissipation of a fund which was the subject-matter of the action and in which the plaintiff claimed an interest. In a later case before the same court, an injunction against the transfer of assets as a means of providing security for the performance of a decree—even after the establishment of liability—was denied and the *Zenith* case was distinguished on that ground. *Wahlgren* v. *Bausch & Lomb Optical Co.*, 77 F. (2d) 121, 123 (C. C. A. 7th).

III.

The order of the District Court is not justified by either the injunction statutes of New York or the claimed analogy to the writ of ne exeat.

The respondent replies upon Sections 877-878 of the New York Civil Practice Act, which define the cases in which an injunction may be entered. These sections, which are set out in full in the Appendix to this reply brief, do not support the order, and on the contrary show that the injunctive power of a Court of Equity is limited to orders protecting some alleged existing *right* of the plaintiff.

Section 877 provides for the normal case in which the plaintiff sues for an injunction against the commission or continuance of an act and seeks a preliminary injunction against the commission or continuance of that act during the pendency of the suit.

Section 878 authorizes the issuance of an injunction against "an act in violation of the plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual." It further provides for an injunction against the removal or disposition of assets "where it appears that the defendant during the pendency of the action threatens or is about to remove or dispose of his property with intent to defraud the plaintiff . . . ."

These sections have been authoritatively construed by the courts of New York as permitting injunctions only against acts which invade some alleged right of the plaintiff. In *Campbell v. Ernest*, 64 Hun. 188, an injunction was obtained against transfer of the defendant's assets, in order to secure payment of the judgment which the plaintiff ultimately sought. Upon appeal the injunction order was reversed and it was held that injunction would not lie for such a purpose. After quoting the statues which now are contained in Sections 877 and 878 of the Civil Practice Act, the court said (64 Hun. 191):

"It was the design of the law to empower the Court to enjoin the commission of some particular act which the defendant was doing or procuring, or suffering or threatening, in violation of the rights of the plaintiff respecting the subject of the action, or where he was about to remove or dispose of his property with intent to defraud the plaintiff. But it never was intended to authorize the restraint of all sales of property.

"Moreover, before any act can be restrained, it must be violative of the rights of the plaintiff respecting the subject of the action, and we may pause here to say that the property of the defendant is not the subject of this action, and no act of the defendant in relation thereto can violate any rights of the plaintiff respecting the same for that reason, and for the additional reason that the plaintiff has no rights in such property, and claims none.

"In short, this statute has no application to an action of this character where a moneyed judgment only is sought. It was designed to provide a short and easy method for the procurement of injunctions in equitable actions for relief where the defendant, if unrestrained, would do or suffer some act in violation of the rights of the plaintiff respecting the subject of the action, which would tend to render the judgment ineffectual and nugatory. *But plainly it applies, and can be utilized only in an action involving the rights of the parties to something which constitutes the subject of the action in respect to which the plaintiff claims some rights and seeks some special relief.*" (Italics added)

The statutes were similarly construed in *Platt* v. *Elias*, 101 N. Y. App. Div. 518, where it was held that the court was not authorized to issue an injunction against transfer of the defendant's assets as security for performance of a decree to be entered in the suit. After pointing out that there was no showing, among other things, that the plaintiff would be entitled to recover any specific property in the possession of the defendant, the court said:

"* * * As I view it, the plaintiff is no more entitled to an injunction in this action than in any case

where a cause of action is alleged against a defendant and the plaintiff then seeks to sequestrate all of the defendant's property so that it may be held to apply to any judgment which he may obtain against the defendant."

The cases cited in the respondent's brief are in accord with these principles. *Bronx County Trust Company* v. *O'Connor*, 220 N. Y. App. Div. 340 was an action to impress a trust on certain funds, and the preliminary injunction restrained disposition of the trust fund which the plaintiff claimed. *Maine Products Company* v. *Alexander*, 115 N. Y. App. Div. 112 was a suit to rescind a sale of corporate stock and the injunction against transfer of that stock *pendente lite* was one relating to the specific subject matter of the suit. Similarly, in *Smith* v. *Bradlee*, 37 N. Y. Supp. 512, an injunction was issued against disposing of the assets of a corporation out of which allowances were being sought by counsel in a stockholders' derivative action, the right to such allowances being predicated on Section 61a of the General Corporation Law.

The analogy which the respondent seeks to draw between this order and the writ of *ne exeat regno*—long since a legal curiosity—is too far-fetched to require discussion. The order is not and does not purport to be a *ne exeat*, but is simply a requirement that the petitioners not use or dispose of their property. The Federal statute (Judicial Code, § 261) which preserves the writ in appropriate cases does not extend its scope so as to permit such an order. In New York the writ has been abolished in its entirety. (*N. Y. Civil Rights Law*, § 23). The respondent cannot escape the necessity of justifying the order below under the provisions of Rule 64. This, for the reasons already set forth, it has utterly failed to do.

Respectfully submitted,

JOHN M. HARLAN,
JOHN E. F. WOOD,
Counsel for Petitioners.

APPENDIX.

Sections 877 and 878 of the New York Civil Practice Act.

§ 877. *Injunction, when the right thereto depends upon the nature of the action.* Where it appears from the complaint that the plaintiff demands and is entitled to a judgment against the defendant restraining the commission or continuance of an act, the commission or continuance of which during the pendency of the action would produce injury to the plaintiff, an injunction order may be granted to restrain it. The case provided for in this section is described in this act as a case where the right to an injunction depends upon the nature of the action.

§ 878. *Injunction, when the right thereto depends upon extrinsic facts.* In either of the following cases an injunction order may also be granted in an action:

1. Where it appears that the defendant, during the pendency of the action, is doing or procuring or suffering to be done, or threatens, or is about to do, or to procure or suffer to be done, an act in violation of the plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual, an injunction order may be granted to restrain him therefrom.

2. Where it appears that the defendant during the pendency of the action threatens or is about to remove or to dispose of his property, with intent to defraud the plaintiff, an injunction order may be granted to restrain the removal or disposition.

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In the Supreme Court of the United States

OCTOBER TERM, 1944

DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD. AND DIAMOND TRADING COMPANY, LTD.

v.

UNITED STATES OF AMERICA

SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO AND COMPANHIA DE DIAMANTES DE ANGOLA

v.

UNITED STATES OF AMERICA

ON MOTIONS FOR LEAVE TO FILE PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the district court (R. 97[1]) has not yet been reported.

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[1] The designation "R." will be used to refer to the record filed by Societe Internationale, etc., Du Congo and its co-petitioner, and the designation "DB" to refer to the record filed by De Beers Consolidated Mines, Ltd., and its co-petitioners. As to matters common to both records, reference will be made to the former record.

JURISDICTION

The order of the district court sought to be reviewed was entered on April 3, 1945 (R. 99). By motions for leave to file petitions for writ of certiorari filed in this Court shortly thereafter, petitioners seek to invoke the jurisdiction of this Court under Section 262 of the Judicial Code, 28 U. S. C. sec. 377.

QUESTION PRESENTED

Whether it is appropriate for this Court to issue writs of certiorari under Section 262 of the Judicial Code to review the action of the district court in granting a preliminary injunction prohibiting petitioners, *pendente lite*, from withdrawing or disposing of certain money and property in the United States belonging to petitioners.

STATUTES INVOLVED

Section 262 of the Judicial Code, 28 U. S. C. sec. 377, provides in part:

> The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

Section 2 of the Expediting Act of February 11, 1903, as amended, 15 U. S. C. sec. 29, provides in part:

> In every suit in equity brought in any district court of the United States under any of said Acts,[2] wherein the United States is complainant, an appeal from the final decree of the district court will lie only to the Supreme Court * * *.

Section 4 of the Act of July 2, 1890, 15 U. S. C. sec. 4, known as the Sherman Act, provides in part:

> The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; * * *. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

STATEMENT

By a civil complaint filed in the court below on January 29, 1945, against nine foreign corporations and certain individuals the United States

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[2] The "said Acts" referred to are the Sherman Act, the Interstate Commerce Act, and any other act having a "like purpose." See *Columbia Gas & Elec. Corp.* v. *American Fuel & Power Co.*, 322 U. S. 379, 381.

charged the defendants with having been long engaged in a conspiracy to restrain and monopolize commerce of the United States with foreign nations in gem and industrial diamonds, in violation of Sections 1 and 2 of the Sherman Act (R. 6–9, 12). The defendants were also charged with conspiring to restrain free competition in trade of the United States and to increase the market price in this country of imported diamonds, in violation of Section 73 of the Act of August 27, 1894, 15 U. S. C. sec. 8, known as the Wilson Tariff Act (R. 12).

The complaint alleges, *inter alia:*

The defendant corporations and their subsidiaries produce and sell approximately 95% of all the diamonds produced in the world (R. 11);[3] the principal market for diamonds is in the United States, to which country the imports in 1942 and 1943 were greater than the total world production of diamonds in these years (ibid.); the defendants have controlled the marketing of diamonds in the United States principally by causing all diamonds produced in Africa to be sold through a single selling agency (R. 13); each corporate defendant has for many years transacted business in the southern district of New York and is found therein (R. 6); defendants have furthered their purpose of maintaining prices on diamonds sold for export to the

[3] The important sources of industrial diamonds are the Union of South Africa and other areas in Africa, such as the Belgian Congo and Portuguese Angola (R. 10).

United States by numerous acts done in this country (R. 22); their combination has consisted of continuing agreement:

> (a) to prevent dealers and consumers in the United States from purchasing diamonds from the producers, (b) to prevent all sale or purchase of diamonds for export to or import into the United States except by purchase through Diamond Trading Company and except subject to terms and conditions set by defendants, (c) to prevent all persons in the United States other than certain favored brokers, dealers, and cutters from purchasing diamonds from the Diamond Trading Company, (d) to limit the production and supply of diamonds, (e) to limit and restrict the quantity of diamonds imported into the United States, and (f) to fix, stabilize, and enhance the prices at which diamonds are sold in the United States (R. 12–13).

The United States filed with the complaint an application for a temporary restraining order to restrain the corporate defendants from withdrawing or disposing of their property within the United States until the district court should have determined the issues and the defendant corporation should have complied with its orders (R. 28–29). The Government also filed at the same time a motion for a preliminary injunction of the same scope and effect (R. 34). The requested temporary restraining order was granted (R. 30–31).

Argument on the motion for a preliminary injunction was postponed until March 2, 1945, at the request of defense counsel (R. 40, 42, 43, 51), and the court on March 28, 1945, rendered its opinion on the motion (R. 97).

The court held that under Section 4 of the Sherman Act and Section 262 of the Judicial Code it had power to issue the requested injunction (R. 97–98). On the question of exercise of this discretionary power, the court concluded from the facts appearing in the verified complaint and in the affidavits supporting and opposing the Government's motion, that if injunction should not issue the corporate assets "will in all probability be withdrawn from this country", in which event there would be "no way to enforce" the court's decree if the Government should prevail (R. 98). As bearing upon the proper exercise of its discretion, the court noted the "incomparably greater" damage to the Government if the injunction were denied than any damage to the defendants resulting from granting it, and the principle that equity will take necessary steps to protect its jurisdiction where there is a great probability that enforcement of its decrees will otherwise be frustrated (*ibid.*).[4]

[4] Prior to this decision the court's restraining order had been continued and modified in various ways to accommodate the business needs of the defendants (R. 35, 37–38, 41, 43, 51–53, 68–70, 75).

The court said that the question whether the defendants were doing business in this country was not before it on the motion and that it was not passing on this question (R. 98). The court adopted the facts alleged in the verified complaint as its findings of fact for the purposes of the motion only (*ibid.*).

The preliminary injunction which the court below granted does not apply to any property of the corporate defendants brought into this country after January 29, 1945, the date on which the court's temporary restraining order was issued (R. 101–102).

ARGUMENT

I

The appropriateness of issuing writ of certiorari under Section 262

Normally preliminary injunctions granted by district courts are reviewable by the circuit courts of appeals under Section 129 of the Judicial Code, 28 U. S. C. sec. 227, and their final judgments are reviewable by circuit courts of appeals under Section 128 of the Judicial Code, 28 U. S. C. sec. 225. With reference to the change made by the Expediting Act, this Court said in *United States* v. *California Cooperative Canneries*, 279 U. S. 553, 558:

> These provisions governing appeals in general were amended by the Expediting Act so that in suits in equity under the antitrust

act "in which the United States is complainant," the appeal should be direct to this Court from the final decree in the trial court. Thus, Congress limited the right of review to an appeal from the decree which disposed of all matters (see *Collins* v. *Miller*, 252 U. S. 364); and it precluded the possibility of an appeal to either court from an interlocutory decree.[5]

This rule and the policy it serves would be impaired if review of an interlocutory decree entered in a civil proceeding brought by the Government under the Sherman Act may be obtained by means of a writ from this Court under Section 262 of the Judicial Code. The grant of such a writ under these circumstances would also be in conflict with a more general policy. From the time of Chief Justice Marshall to the present day this Court has firmly set its face against use of the extraordinary remedies authorized by Section 262 to bring up for review interlocutory rulings in proceedings as to which Congress has permitted appeals only from final judgments. To do so would be to "thwart the Congressional policy against piecemeal appeals" and would be a "plain evasion" of the mandate of Congress that appellate review be confined to final judgments. *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 30, and cases cited at pp. 30–31; *Bank of Columbia* v. *Sweeney*, 1 Pet. 567, 569.

[5] See also *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U. S. 137, 142–143.

This is not a case where the ruling of the inferior court had the effect of preventing adjudication of the cause pending before it and therefore thwarted or tended to thwart appellate review. See *Ex parte United States*, 287 U. S. 241; *Whitney* v. *Dick*, 202 U. S. 132. Nor is it a case in which the action of the district court in denying a foreign Government's claim of immunity, which the political branch of our Government had supported, might endanger the conduct of our foreign relations, so that prompt appellate review was of "public importance." *Ex parte Peru*, 318 U. S. 578.

It is doubtful whether it would ever be appropriate to employ any of the extraordinary remedies authorized by Section 262 to review the question whether an inferior court had, in a matter calling for the exercise of judicial discretion, improperly exercised its discretion.[6] Certainly the remedy would be appropriate only if there had been a gross abuse of discretion or a plain miscarriage of justice. Upon the facts of the present case, the action of the district court, in granting the preliminary injunction, was well within the range of judicial discretion. Upon balancing (1) the injury to the Government to be anticipated

[6] The basis of the ruling in *Ex parte United States*, 287 U. S. 241, was that the act which the district court had erroneously failed to perform was not discretionary but ministerial.

from a withdrawal of assets which might defeat the effectiveness of any decree issued in the cause and (2) the injury to the petitioners caused by the preliminary injunction, it is clearly permissible to conclude that the balance lies in favor of granting the requested injunction. The actual burden imposed upon the defendants is no more than the cost of procuring a bond so conditioned as to protect the United States against the consequences of lifting the restraints of the present preliminary injunction.[1]

The question of the power of the district court to grant the preliminary injunction does not, we submit, raise a question of public importance or one which would make it appropriate for this Court to intervene by a writ under Section 262 notwithstanding the resulting circumvention of the appellate procedure prescribed by Congress. This case does not involve, as do the export association cases (Nos. 1016, 1017, this Term), a question of the respective jurisdictions of the federal district courts and a Governmental agency, determination of which in favor of the petitioners in those cases would terminate the litigation. Even in

[1] The condition of such a bond might be that if a final decree on the merits be entered against petitioners, and if they shall fail to perform acts required of them by the decree, and if upon the issuance of sequestration for contempt under Rule 70 of the Rules of Civil Procedure they shall be found without goods or funds within the jurisdiction in the amount as to which they are now restrained by the preliminary injunction, the difference shall be paid into court.

the export association cases this Court appears to be in doubt as to the appropriateness of reviewing an interlocutory ruling in a Sherman Act proceeding by a writ under Section 262; the Court in granting the writs requested counsel to discuss this question in their briefs and on oral argument

Even if the district court exceeded its power in granting the preliminary injunction it does not follow that immediate correction of the error is of public importance. Those adversely affected are private parties.[8] The injury suffered through delay in rectifying the error until appeal can be taken from final judgment—the cost of furnishing an appropriate bond—would seem far less burdensome than the necessity of standing trial in a complicated litigation where the trial court has erroneously overruled a demurrer to the complaint or indictment. But this Court, in holding that such burden does not furnish ground for correction by a writ under Section 262, has said that it "is one which we must take it Congress contemplated in providing that only final judgments should be reviewable." *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 30.

If certiorari should be granted both in the export association cases and in the present cases

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[8] While it appears that a foreign government owns stock in one of the petitioners (R. 84) such a financial interest does not make the corporate defendant any less a private party. An affidavit filed by the Government states that the stock so held by the foreign government is non-voting stock (R. 54).

this Court is likely to be confronted with a flood of applications for writs to review interlocutory rulings by district courts in proceedings under the Sherman Act. The question of where the line is to be drawn between review and non-review by means of the extraordinary remedies authorized by Section 262 will, it would seem, have to be fought over in many cases.

II

The power of the District Court to grant the preliminary injunction

There can be no doubt that the district court had power to grant the injunction. Section 4 of the Sherman Act (*supra*, p. 2), which confers jurisdiction upon the district courts to entertain petitions filed by the Government to restrain violations of that Act, provides that the court may at any time before final decree "make such temporary restraining order or prohibition as shall be deemed just in the premises."

Section 262 of the Judicial Code (*supra*, p. 2) also authorizes district courts to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their jurisdiction, "and agreeable to the usages and principles of law."

Federal district courts in proceedings in which equity jurisdiction is conferred upon them possess the general powers of a court of chancery.

Sprague v. *Ticonic Bank*, 307 U. S. 161, 167; *Fitch* v. *Creighton*, 24 How. 159, 162–163; *Waterman* v. *Canal Louisiana Bank Co.*, 215 U. S. 33, 43–44; *Irvine* v. *Marshall*, 20 How. 558, 564–565.

Among their powers as courts of chancery, the district courts specifically possess the power to enjoin a defendant's disposition of his assets pending the proceedings. *Deckert* v. *Independence Shares Corp.*, 311 U. S. 282, 290. This power to enjoin disposition of assets is not limited or governed by Rule 64 of the Rules of Civil Procedure and is not, therefore, limited to the remedies given by State law. Issuance of preliminary injunctions is provided for by Rule 65 of the Rules of Civil Procedure.

Use of the injunctive power by federal courts sitting in equity is proper for the purpose of preserving the effective jurisdiction of the court. *Looney* v. *Eastern Texas R. R. Co.*, 247 U. S. 214; *Kline* v. *Burke Construction Co.*, 260 U. S. 226. Use of the injunctive power is proper to prevent acts by defendant which will frustrate the plaintiff's remedy. *Deckert* v. *Independence Shares Corp.*, 311 U. S. 282, 290; *Ohio Oil Co.* v. *Conway*, 279 U. S. 813. Where the preliminary injunction is not sought as a means to obtain *in limine* all the ultimate relief upon the merits of the case but is sought for these protective purposes, the injunction should be granted if the questions raised on the face of the complaint are grave and important

and if the balance of convenience between the parties favors the plaintiff. *Ohio Oil Co.* v. *Conway, supra.* In the case cited this Court held that the district court abused its discretion in denying a preliminary injunction against the collection of State taxes which were alleged to be unconstitutional and which, on the facts before the district court, were not recoverable after payment. Where a preliminary injunction was thus necessary in order to prevent loss of remedy for the plaintiff, this Court thus stated (p. 815) the test of the propriety of issuing a preliminary injunction:

> Where the questions presented by an application for an interlocutory injunction are grave and the injury to the moving party will be certain and irreparable if the application be denied and the final decree be in his favor, while if the injunction be granted the injury to the opposing party, even if the final decree be in his favor will be inconsiderable, or may be adequately indemnified by a bond, the injunction usually will be granted.

Preliminary injunctions may even be granted to afford preliminary relief on the merits where the questions raised by the plaintiff are grave and where he will suffer substantial loss during the litigation if preliminary injunction is denied. *Gibbs* v. *Buck*, 307 U. S. 66, 77–78.

The present petitioners' challenge of the power of the district court to grant the preliminary

injunction must go so far as to say that even if they, while admitting they were subject to the court's jurisdiction, should announce that they intend to flee the jurisdiction and withdraw all their funds and thus deliberately act so as to render the court impotent, the court would nevertheless be powerless to interfere. The decisions previously cited establish that the court may interfere to prevent any such frustration of the rights asserted by the plaintiff, which in this case is the United States. Courts of equity frequently go much further either to give or to withhold relief in furtherance of the public interest than where only private interests are involved. *Virginian Railway Co.* v. *System Federation No. 40,* 300 U. S. 515, 552.

In proceedings under Section 4 of the Sherman Act, district courts exercise all the powers of a court of equity to adjudicate the cause and to give effective relief. Such proceedings are in chancery. *Swift & Co.* v. *United States,* 276 U. S. 311. The power conferred to grant preliminary injunctions is not confined to those which "prevent and restrain violations" of the Sherman Act and the contrary citations in the De Beers petition (p. 17) are, we submit, not even remotely in point. Section 4 does not in terms authorize a district court to enjoin one who has violated the Act from engaging in *any* interstate commerce, but this Court has held that such an injunction could and should be entered if necessary or convenient

in order to make the relief decreed by the court effective. *United States* v. *American Tobacco Co.*, 221 U. S. 106, 188. If, to achieve such purpose, the court's final decree may so provide, the power to grant a preliminary injunction may be so exercised as to enable the court to enter an effective final decree.

Certain contentions advanced by petitioners in challenge of the district court's power are irrelevant because they relate to matters which either are not a basis of or are not a necessary foundation for the injunction issued below. Other questions raised by them go, not to the power of the district court, but to the proper exercise of its discretion.

Petitioners contend that attachment or seizure is not permissible under the circumstances of this case. But the injunction is not an attachment or seizure.

The injunction is not an attachment. Under State practice attachment may afford a means of proceeding *in rem* for relief against an absent defendant.* This the injunction does not do. If it is found that the district court does not have

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* Before adoption of the new rules, it was settled law that State attachment remedies are not available in federal courts against absent defendants. *St. Louis B. & M. Ry. Co.* v. *Taylor*, 266 U. S. 200, 208; *Big Vein Coal Co.* v. *Read*, 229 U. S. 31, 37–38. In *Davis* v. *Ensign-Bickford Co.*, 139 F. 2d 624, 625–626 (C. C. A. 8), it was held that the previous law was not changed by the Rules.

personal jurisdiction as to any petitioner, as to it the preliminary injunction falls.

The injunction is not a seizure. Rule 64 of the Rules of Civil Procedure makes available in federal courts State remedies through seizure, as by attachment, replevin, distress, arrest, and the like. This Rule does not disturb the injunctive powers of district courts and issuance of preliminary injunction is regulated by Rule 65. It is as part of their powers as courts of chancery that federal district courts may enjoin *pendente lite* disposition of a defendant's assets (*Deckert* v. *Independence Shares Corp.*, 311 U. S. 282, 290) and the procedure of federal courts in injunction and receivership proceedings is by virtue of these powers rather than in exercise of remedies under State law of the kind made available by Rule 64 (Moore's *Federal Practice* (1938), § 64.01).

The injunction below is not a sequestration. No question of actual seizure or of forefeiture can arise unless and until sequestration should be applied for under Rule 70 after non-compliance with a final decree in the Government's favor.

The injunction below is not an exercise of means to compel defendants to appear. Neither the terms nor the practical effect of the injunction compel petitioners to appear in the district court or confer upon it jurisdiction over their persons. If the Government does not establish such jurisdiction, the restraint of the injunction ends. But

if petitioners are found to have been in the jurisdiction of the court at the time the complaint in this case was filed, what the injunction does prevent is a withdrawal of assets which would have the effect of a flight from the jurisdiction. The injunction is therefore not a *distringas* or a writ of *peine fort. et dure.*

Petitioners inferentially assert that the complaint does not state a valid cause of action. They have not moved to dismiss the complaint upon the merits, either by motion for judgment on the pleadings under Rule 12 (c) or by motion for summary judgment under Rule 56, but they insist that if the case is doubtful a preliminary injunction should not issue. This is a contention as to the proper exercise of the district court's discretion, not its power to issue the injunction. Furthermore, it is when the preliminary injunction grants relief of the character of the ultimate relief sought that courts are reluctant to grant preliminary relief if there is doubt as to whether the plaintiff will ultimately prevail, but where, as here, the preliminary relief is for the purpose of protecting the plaintiff against possible loss of all remedy, relief should be granted if the balance of convenience favors the plaintiff. *Ohio Oil Co.* v. *Conway*, 279 U. S. 813, 815.

The Government submits, in addition, that the complaint clearly states a valid cause of action. It sets forth a combination by those controlling

95% of total world production to restrain the import trade of the United States in gem and industrial diamonds and to maintain high prices for diamonds in this country. It alleges that the combination has had this effect and that it has been carried out and made operative within the United States by numerous acts in furtherance thereof performed within this country. Such a combination violates the Sherman Act. *United States* v. *Pacific & Arctic Railway & Navigation Co.*, 228 U. S. 87; *Thomsen* v. *Cayser*, 243 U. S. 66; *United States* v. *Sisal Sales Corp.*, 274 U. S. 268; *United States* v. *Aluminum Company of America* (C. C. A. 2), No. 144, October Term 1944, decided March 12, 1945, pp. 1246–50.

The question of whether the district court properly exercised its discretion in granting the preliminary injunction has been attacked by petitioners from so many angles that we wish, in conclusion, to summarize the considerations relevant to the action which it took.

The need for the injunction was imperative to enable the court to give effect to any final decree entered against the petitioners. Only through sequestration of their funds located here, for noncompliance with a final decree against them on the merits, as authorized by Rule 70 of the Rules of Civil Procedure, will the district court have power to afford the Government relief and to make the court's final judgment effective. The cause of

action is not transitory and, we assume, final judgment therein, though entered against parties within the court's jurisdiction, could not be enforced in the courts of a foreign country, as could a judgment on a proprietary or pecuniary claim. Petitioners have every reason to withdraw their funds before the remedy of sequestration could be enforced. The present certiorari proceedings are directed toward obtaining freedom to remove their funds. No showing has been made of hardship or burden in the giving of a security bond which would permit the lifting of the present restraint. It appears to be petitioners' objective to put themselves in a position which will enable them to disobey, with impunity, any decree on the merits which the court may enter against them. We submit that on the question of need and of balance of injury the district court could have arrived at no other conclusion than that reached and that, in any event, there was no abuse of discretion meriting review by an extraordinary remedy under Section 262 of the Judicial Code.

III

Petitioners' application for a stay of the District Court's order

The petitioners on April 6, 1945, submitted to Mr. Justice Jackson of this Court applications for a stay of the district court's order. The grounds of the Government's opposition to such a stay are

set forth in a memorandum entitled "Note of Argument for the United States in Opposition to the Application for Stay of the District Court's Order of April 3, 1945" submitted to Mr. Justice Jackson on April 6, 1945, nine copies of which have been furnished to the Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that the motions for leave to file petitions for writs of certiorari should be denied.

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Nos. 1189 and 1190

In the Supreme Court of the United States

OCTOBER TERM, 1944

DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD. AND DIAMOND TRADING COMPANY, LTD., PETITIONERS

v.

UNITED STATES OF AMERICA

SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO AND COMPANHIA DE DIAMANTES DE ANGOLA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF N. W YORK

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (R. 97)[1] has not yet been reported.

[1] The designation "R." will be used to refer to the record filed by Societe Internationale, etc., Du Congo and its co-

JURISDICTION

The order of the district court sought to be reviewed was entered on April 3, 1945 (R. 99). Motions for leave to file petitions for writs of certiorari and petitions for writs of certiorari were filed in No. 1189 on April 5, 1945, and in No. 1190 on April 6, 1945. The jurisdiction of this Court is invoked under Section 262 of the Judicial Code, 28 U. S. C. sec. 377.

On April 23, 1945, this Court granted the motions and petitions and requested counsel to discuss in their briefs and upon oral argument the "question whether the order of the District Court may appropriately be reviewed at the present stage of the proceedings by writ of certiorari under section 262 of the Judicial Code".

QUESTIONS PRESENTED

(1) Whether the order of the district court granting a preliminary injunction restraining the removal or other disposition of certain of petitioners' domestic assets may appropriately be reviewed by this Court at the present stage of the proceedings by writ of certiorari under Section 262 of the Judicial Code.

(2) Whether the district court was authorized by Section 4 of the Sherman Act, Section 262 of

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petitioner, and the designation "DB" to refer to the record filed by De Beers Consolidated Mines, Ltd., and its co-petitioners. As to matters common to both records, reference will be made to the former record.

the Judicial Code and its inherent equity power to enter the order as a necessary means of retaining its power to enforce its final decree by sequestration under Rule 70 of the Rules of Civil Procedure; and, if so authorized, whether the entry of the order was an abuse of discretion when it appeared that it was necessary to protect the Government from irreparable injury through loss of the right to effective relief and inconvenience to petitioners was slight.

STATUTES INVOLVED

Sections 1, 2, and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended, commonly known as the Sherman Act, 15 U. S. C. secs. 1, 2, 4, provide in part:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * * Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.
>
> SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.

SEC. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * *

Section 73 of the Act of August 27, 1894, 28 Stat. 509, as amended, commonly known as the Wilson Tariff Act, 15 U. S. C. sec. 8, provides in part:

SEC. 73. Every combination, conspiracy, trust, agreement, or contract is hereby declared to be contrary to public policy, illegal, and void when the same is made by or between two or more persons or corporations, either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported articles enters or is intended to enter. Every person who is or shall hereafter be engaged in the importation of goods or any

> commodity from any foreign country in violation of this section of this Act, or who shall combine or conspire with another to violate the same, is guilty of a misdemeanor, * * *.

Section 262 of the Judicial Code, 28 U. S. C. sec. 377, provides in part:

> * * * The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

Section 2 of the Expediting Act of February 11, 1903, as amended, 15 U. S. C. sec. 29, provides in part:

> In every suit in equity brought in any district court of the United States under any of said Acts,[2] wherein the United States is complainant, an appeal from the final decree of the district court will lie only to the Supreme Court * * *.

STATEMENT

On January 29, 1940, the United States filed a civil action seeking equitable relief against nine foreign corporations and seven individuals charged with having long engaged in a conspiracy to

[2] The "said Acts" referred to are the Sherman Act, the Interstate Commerce Act, and any other act having a "like purpose." See *Columbia Gas & Elec. Corp.* v. *American Fuel & Power Co.*, 322 U. S. 379, 381.

restrain and monopolize the commerce of the United States with foreign nations in gem and industrial diamonds in violation of Sections 1 and 2 of the Sherman Act (R. 6–9, 12). The defendants were also charged with conspiring to restrain free competition in trade of the United States and to increase the market price in this country of imported diamonds, in violation of Section 73 of the Act of August 27, 1894, 15 U. S. C. sec. 8, known as the Wilson Tariff Act (R. 12).

The complaint alleges *inter alia:* The defendant corporations and their subsidiaries produce and sell approximately 95% of all the diamonds produced in the world (R. 11),[3] the principal market[4] for diamonds is in the United States, to which country the exports in 1942 and 1943 were greater than the total world production of diamonds in these years, *ibid.*; the primary purpose of the defendants is to maintain the prices of diamonds sold in or for export to the United States (R. 21–22); the defendants have controlled marketing of diamonds in the United States principally by causing all diamonds produced in Africa to be sold through a single selling

[3] Substantially all diamonds are produced in Africa, the most important producing areas being the Belgian Congo, Portuguese Angola, and the Union of South Africa (R. 10). The Belgian Congo is the principal source of industrial diamonds (R. 7).

[4] Industrial diamonds are an essential industrial material (R. 9–10).

agency (R. 13); defendants have furthered their purpose of maintaining prices on diamonds sold in or for export to the United States by numerous acts done in this country, many of which are alleged in specific detail in the complaint (R. 22); each corporate defendant has for many years transacted business in the southern district of New York and is found therein (R. 6); their combination has consisted of continuing agreement:

> (a) to prevent dealers and consumers in the United States from purchasing diamonds from the producers, (b) to prevent all sale or purchase of diamonds for export to or import into the United States except by purchase through Diamond Trading Company and except subject to terms and conditions set by defendants, (c) to prevent all persons in the United States other than certain favored brokers, dealers, and cutters from purchasing diamonds from the Diamond Trading Company, (d) to limit the production and supply of diamonds, (e) to limit and restrict the quantity of diamonds imported into the United States, and (f) to fix, stabilize, and enhance the prices at which diamonds are sold in the United States (R. 12–13).

It is further alleged that as a result of defendants' acts dealers in diamonds in the United States are dealt with oppressively and monopolistic and exorbitant prices are maintained on all diamonds sold to the United States market

(R. 25–26). The complaint prays cancellation of the exclusive sales agreements insofar as they operate to restrain imports into the United States and an injunction against their renewal. The complaint also includes a prayer for an order enjoining the corporate defendants from withdrawing from the United States, or disposing of, assets then within the United States, until such time as the court shall have determined the issues and the corporate defendants shall have complied with its orders (R. 26–27).

The United States filed with the complaint an application for a temporary restraining order so enjoining withdrawal or disposal by the corporate defendants of their assets then within the United States (R. 28–29) and a motion for a preliminary injunction of the same scope and effect (R. 34). The temporary restraining order was granted (R. 30–31).[8] Argument on motion for a preliminary injunction was postponed until March 2, 1945, at the request of defense counsel (R. 40, 42, 43, 51), and the court on March 28, 1945, rendered its opinion granting the motion (R. 97) and on April 3, 1945, entered its order (R. 99).

The court held that under Section 4 of the Sherman Act and Section 262 of the Judicial

[8] The restraining order was continued and modified in various ways to accommodate the business needs of the defendants (R. 35, 37–38, 41, 43, 51–53, 68–70, 75).

Code it had power to issue the requested injunction (R. 97–98, 100). On the question of exercise of this discretionary power, the court concluded from the facts appearing in the verified complaint and in the affidavits supporting and opposing the Government's motion, that if injunction should not issue the corporate defendants "would in all probability" "quickly withdraw their assets from the United States," in which event "there would be no way to enforce" the court's decree if the Government should prevail (R. 100, 98). The court further found that the resulting damage to the Government "would be incomparably greater" than any damage to the corporate defendants from the preliminary injunction (R. 100, 98). These conclusions of fact are set forth in the court's opinion and are stated as findings of fact in the order granting the injunction (R. 100).

After the district court entered the preliminary injunction, motions for leave to file petitions for writs of certiorari under Section 262 of the Judicial Code to review the district court's order were filed in this Court by certain of the corporate defendants.[6] The petitions for certiorari were granted.

[6] Petitioners in No. 1189 are De Beers Consolidated Mines, Ltd., Diamond Corporation, Ltd., and Diamond Trading Company, Ltd., and petitioners in No. 1190 are Societe Internationale Forestiere et Miniere du Congo and Companhia de Diamantes de Angola.

SUMMARY OF ARGUMENT

I

The Expediting Act permits appeal, in civil proceedings brought by the United States under the Sherman Act, only from the district court's "final" decree. Use of one of the extraordinary remedies authorized by Section 262 of the Judicial Code to review an interlocutory decree in such a proceeding would impair the rule laid down by Congress and the policy which that rule serves. In like situations this Court has consistently held that the remedies given by Section 262 may not be employed where their effect would be to thwart the Congressional policy against piecemeal appeals.

In the instant case the question whether the district court exceeded the limits of its judicial discretion in granting the preliminary injunction is not of public importance. Nor is the question of the court's power to grant the injunction of such public importance as to warrant present intervention in the cause by this Court, in circumvention of prescribed appellate procedure. And petitioners make no showing that immediate review is necessary to prevent exceptional hardship or burden.

II

The district courts are empowered to issue preliminary injunctions to protect and preserve their jurisdiction. That jurisdiction extends beyond

the entry of a judgment to its enforcement. This Court has sanctioned a preliminary injunction to enjoin the transfer or disposition of assets as a means of insuring the plaintiff satisfaction of a final adjudication on a claim for money. *Deckert* v. *Independence Shares Corp.*, 311 U. S. 282. An injunction to insure plaintiff of compliance by the defendant with a final decree requiring affirmative acts involves the same principle. A persuasive analogy for such an injunction when issued to prevent non-compliance by a corporation through flight from the jurisdiction is found in the writ of *ne exeat*. Rule 64 of the Rules of Civil Procedure does not govern the issuance of such an injunction, but if it did, the injunction would be authorized under New York laws.

The issuance of the preliminary injunction in this case was not an abuse of the court's discretion. It was necessary in order to enable the court to afford the Government the relief which it seeks and its burden upon the petitioners is insignificant.

ARGUMENT

I

THE PRELIMINARY INJUNCTION ISSUED BY THE DISTRICT COURT MAY NOT BE APPROPRIATELY REVIEWED AT THE PRESENT STAGE OF THE PROCEEDINGS BY WRIT OF CERTIORARI UNDER SECTION 262 OF THE JUDICIAL CODE

Normally preliminary injunctions granted by district courts are reviewable by the circuit courts

of appeals under Section 129 of the Judicial Code, 28 U. S. C. sec. 227, and their final judgments are reviewable by circuit courts of appeals under Section 128 of the Judicial Code, 28 U. S. C. sec. 225. With reference to the change made by the Expediting Act, this Court said in *United States* v. *California Cooperative Canneries*, 279 U. S. 553, 558:

> These provisions governing appeals in general were amended by the Expediting Act so that in suits in equity under the Anti-Trust Act "in which the United States is complainant," the appeal should be direct to this Court from the final decree in the trial court. Thus, Congress limited the right of review to an appeal from the decree which disposed of all matters, see *Collins* v. *Miller*, 252 U. S. 364; and it precluded the possibility of an appeal to either court from an interlocutory decree.[7]

This rule and the policy it serves would be impaired if review of an interlocutory decree entered in a civil proceeding brought by the Government under the Sherman Act may be obtained by means of a writ from this Court under Section 262 of the Judicial Code. The grant of such a writ under these circumstances would also be in conflict with a more general policy. From the

[7] See also *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U. S. 137, 142–143.

time of Chief Justice Marshall to the present day this Court has firmly set its face against use of the extraordinary remedies authorized by Section 262 to bring up for review interlocutory rulings in proceedings as to which Congress has permitted appeals only from final judgments. To do so would be to "thwart the Congressional policy against piecemeal appeals" and would be a "plain evasion" of the mandate of Congress that appellate review be confined to final judgments. *Roche v. Evaporated Milk Assn.*, 319 U. S. 21, 30, and cases cited at pp. 30–31; *Bank of Columbia* v. *Sweeney*, 1 Pet. 567, 569.

This is not a case where the ruling of the inferior court had the effect of preventing adjudication of the cause pending before it and therefore thwarted or tended to thwart appellate review. See *Ex parte United States*, 287 U. S. 241; *Whitney* v. *Dick*, 202 U. S. 132. Nor is it a case in which the action of the district court in denying a foreign Government's claim of immunity, which the political branch of our Government had supported, might endanger the conduct of our foreign relations, so that prompt appellate review was of "public importance." *Ex parte Peru*, 318 U. S. 578.

It is doubtful whether it would ever be appropriate to employ any of the extraordinary remedies authorized by Section 262 to review the

question whether an inferior court had, in a matter calling for the exercise of judicial discretion, improperly exercised its discretion.* Certainly the remedy would be appropriate only if there had been a gross abuse of discretion or a plain miscarriage of justice. Upon the facts of the present case, the action of the district court, in granting the preliminary injunction, was well within the range of judicial discretion. Upon balancing (1) the injury to the Government to be anticipated from a withdrawal of assets which might defeat the effectiveness of any decree issued in the cause and (2) the injury to the petitioners caused by the preliminary injunction, it is clearly permissible to conclude that the balance lies in favor of granting the requested injunction. The actual burden imposed upon the defendants is no more than the cost of procuring a bond so conditioned as to protect the United States against the consequences of lifting the restraints of the present preliminary injunction.**

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*The basis of the ruling in *Ex parte United States*, 287 U. S. 241, was that the act which the district court had erroneously failed to perform was not discretionary but ministerial.

**The condition of such a bond might be that if a final decree on the merits be entered against petitioners, and if they shall fail to perform acts required of them by the decree, and if upon the issuance of sequestration for contempt under Rule 70 of the Rules of Civil Procedure they shall be found without goods or funds within the jurisdiction in the amount as to which they are now restrained by the preliminary injunction, the difference shall be paid into court.

The question of the power of the district court to grant the preliminary injunction does not, we submit, raise a question of public importance or one which would make it appropriate for this Court to intervene by a writ under Section 262 notwithstanding the resulting circumvention of the appellate procedure prescribed by Congress. This case does not involve, as do the export association cases (Nos. 1016, 1017, this Term), a question of the respective jurisdictions of the federal district courts and a governmental agency, determination of which in favor of the petitioners in those cases would terminate the litigation. Even in the export association cases this Court appears to be in doubt as to the appropriateness of reviewing an interlocutory ruling in a Sherman Act proceeding by a writ under Section 262; the Court in granting the writs requested counsel to discuss this question in their briefs and on oral argument.

Even if the district court exceeded its power in granting the preliminary injunction it does not follow that immediate correction of the error is of public importance. Those adversely affected are private parties.[10] The injury suffered through

[10] While it appears that a foreign government owns stock in one of the petitioners (R. 84) such a financial interest does not make the corporate defendant any less a private party. An affidavit filed by the Government states that the stock so held by the foreign government is non-voting stock (R. 54).

delay in rectifying the error until appeal can be taken from final judgment—the cost of furnishing an appropriate bond—would seem far less burdensome than the necessity of standing trial in a complicated litigation where the trial court has erroneously overruled a demurrer to the complaint or indictment. But this Court, in holding that such burden does not furnish ground for correction by a writ under Section 262, has said that it "is one which we must take it Congress contemplated in providing that only final judgments should be reviewable."—*Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 30.

If certiorari should be granted both in the export association cases and in the present cases this Court is likely to be confronted with a flood of applications for writs to review interlocutory rulings by district courts in proceedings under the Sherman Act. The question of where the line is to be drawn between review and non-review by means of the extraordinary remedies authorized by Section 262 will, it would seem, have to be fought over in many cases.

II

THE DISTRICT COURT POSSESSED THE POWER TO ISSUE THE PRELIMINARY INJUNCTION IN ORDER TO PROTECT ITS JURISDICTION, AND ITS ISSUANCE TO PREVENT IRREPARABLE INJURY TO THE PLAINTIFF WAS NOT AN ABUSE OF ITS DISCRETIONARY POWER

A. THE DISTRICT COURT WAS AUTHORIZED BY SECTION 4 OF THE SHERMAN ACT, SECTION 262 OF THE JUDICIAL CODE, AND ITS INHERENT EQUITY POWER TO GRANT THE PRELIMINARY INJUCTION IN ORDER TO RETAIN ITS POWER TO ENFORCE ITS FINAL DECREE BY SEQUESTRATION UNDER RULE 70 OF THE RULES OF CIVIL PROCEDURE

Section 4 of the Sherman Act invests the district courts with jurisdiction to prevent and restrain violations of that Act. The exercise of this jurisdiction is confronted with practical obstacles when the defendants are foreign corporations, controlled abroad, with their principal officers, substantially all of their capital, and all of their producing facilities located in foreign countries. In that situation, the only method of securing their compliance with any decree is through sequestration of their assets, under Rule 70, for refusal to comply with a final decree in favor of the Government. If such a foreign corporation, subject to the court's jurisdiction, should announce its intention to withdraw all of its assets deliberately to de-

prive the court of its power to enforce its decree, is the court powerless to interfere? Petitioners' position necessarily requires an affirmative answer.

Section 4 authorizes proceedings "in equity" [11] and provides that the court may at any time before final decree "make such temporary restraining order or prohibition as shall be deemed just in the premises." In equity cases the federal courts possess the general powers of courts of chancery. *Sprague* v. *Ticonic Bank*, 307 U. S. 161, 164; *Fitch* v. *Creighton*, 24 How. 159, 162–163; *Waterman* v. *Canal-Louisiana Bank Co.*, 215 U. S. 33, 43–44; *Irvine* v. *Marshall*, 20 How. 558, 564–565. In addition, they possess the power, conferred upon them by Section 262 of the Judicial Code, to issue all writs not specifically provided for by statute which may be necessary for the exercise of their jurisdiction and agreeable to the usages and principles of law.

A district court may, in the exercise of these powers, issue a preliminary injunction to protect and preserve its jurisdiction. *Looney* v. *Eastern Texas Railroad Company*, 247 U. S. 214; *Kline* v. *Burke Construction Co.*, 260 U. S. 226. Such an injunction may prohibit acts by a defendant which would prevent the court from awarding upon final adjudication the complete relief to which the plaintiff is entitled. In *Looney* v.

[11] In *Swift & Co.* v. *United States*, 276 U. S. 311, 325, the Court said of a suit by the Government under Section 4 that it could be brought only in a court of equity.

Eastern Texas Railroad Company, supra, a suit by certain railroads to enjoin the Attorney General of Texas from instituting suits against them for complying with an order of the Interstate Commerce Commission, the Court said that the issuance of a preliminary injunction restraining such suits "for the purpose of protecting and preserving" an acquired "jurisdiction until the object of the suit is accomplished and complete justice done between the parties, is familiar and long established practice" (p. 221). In *Ohio Oil Company* v. *Conway,* 279 U. S. 813, a suit to enjoin the collection of taxes imposed by an allegedly unconstitutional statute, it was held error to refuse a preliminary injunction enjoining collection of taxes when it appeared that there could be no recovery of taxes collected or paid under protest.

Such an injunction may also prohibit acts which would prevent a plaintiff from obtaining the full relief awarded by the final adjudication of the court—and the injunction may take the form of enjoining the transfer or disposition of assets. *Deckert* v. *Independence Shares Corp.,* 311 U. S. 282. In that case a suit in equity was brought against an insolvent vendor of securities and a third party having in its possession assets belonging to the vendor. The suit sought rescission of a sale of securities on the ground of fraud, restitution of the consideration paid, and the enforcement of the right to restitution against the vendor's debtor. This Court found no error

in the issuance of a preliminary injunction restraining the vendor's debtor from transferring or disposing of any of the assets of the vendor, in order that the plaintiff's remedy might not be frustrated. It said (p. 290) that "the injunction was a reasonable measure to preserve the status quo pending final determination of the questions raised by the bill."

The jurisdiction of the district court extends beyond the entry of a decree to its enforcement and the power found in the cases referred to must extend to the issuance of an injunction designed to protect that jurisdiction. A persuasive analogy is found in the power to issue the writ of *ne exeat*, a writ developed in chancery (*Bushnell* v. *Bushnell*, 15 Barb. (N. Y.) 399) "to secure the presence of the party in order that the judgment may be executed,—in order that he may not be able to evade it." *Lewis* v. *Shainwald*, 48 Fed. 492, 499–500 (C. C. Cal.); *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208; *In re Lipke*, 98 Fed. 970 (D. C. S. D. N. Y.). Its use has been sanctioned not only where the proceeding was for the enforcement of a pecuniary claim, but also where the suit sought performance by defendants of specific acts. Gibson's *Suits in Chancery* (1907), Section 865. *Palmer* v. *Palmer*, 84 N. J. Eq. 550. In practice the defendant was relieved from the prohibitions of the writ by giving a bond "to render himself amenable to the process of the court, which may be issued to enforce the performance of the

decree." *Mitchell* v. *Bunch*, 2 Paige 606, 617. The purpose of the injunction of the court below, like that of the writ of *ne exeat*, was to protect the plaintiff against loss of remedy through flight of the foreign corporate defendants. That flight can be prevented in no other way than enjoining the removal of their assets. At a time when a substantial part of the foreign and domestic commerce of the United States is conducted by foreign corporations, equity should mould its historic remedies to meet modern conditions.

Petitioners cite no decision of this Court denying the existence of power to issue the challenged injunction. The decisions of the lower federal courts referred to hold only that the circumstances were not such as to warrant the issuance of injunctions against individuals. *Wahlgren* v. *Bausch & Lomb Optical Company*, 77 F. 2d 121 (C. C. A. 7); *Guth* v. *Groves*, 44 F. Supp. 851 (D. C. S. D. N. Y.). A more pertinent lower court decision is *Zenith Carburetor Co.* v. *Stromberg Motor Devices Co.*, 270 Fed. 421 (C. C. A. 7). In this case a suit was brought against the domestic subsidiary of a French corporation to enjoin patent infringement and for an accounting. The court after finding infringement referred the case to a master for the determination of damages. On application of the plaintiff, pending the proceedings before the master, the court granted an injunction prohibiting the defendant from disposing of its assets by sending money beyond the

jurisdiction of the court or sending assets to the French parent corporation. On appeal, the Court of Appeals in approving a modified injunction, expressly overruled the contention that the district court lacked power to enjoin the transfer of assets.

Petitioners challenge the power of the court below on several other grounds:

1. Petitioners assert it to be "settled law" that the injunctive relief provided by Section 4 of the Sherman Act must be confined to injunctions "to prevent and restrain" violations of the antitrust laws. This assertion is not even remotely supported by the decisions which they cite (De Beers pet. 17) and is contrary to the decisions of this Court. Section 4 does not specifically authorize an injunction against payment or collection of dividends but such an injunction was held authorized in *Northern Securities Co.* v. *United States*, 193 U. S. 197. Section 4 does not in terms authorize a district court to enjoin one who has violated the Act from engaging in *any* interstate commerce, but this Court has held that such an injunction could and should be entered if necessary or convenient in order to make the relief decreed by the Court effective. *United States* v. *American Tobacco Co.*, 221 U. S. 106, 188. If to make a decree effective, a district court may enter such injunctions, the power to grant a preliminary injunction may be so exercised as to enable the Court to enter an effective final decree.

2. Petitioners contend (1) that the injunction is an attachment, (2) that under Rule 64 of the Rules of Civil Procedure the remedy of attachment is authorized only as provided by State law, and (3) that New York law does not permit attachment in an equity proceeding. The Government's answer to these contentions is that the injunction granted in this case is not an attachment and is not governed by Rule 64.

Rule 64 makes available in the federal courts remedies given by State law providing for "seizure" of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered. The injunction granted in the present case operates strictly *in personam* against petitioners (R. 100–101). It is not a seizure of their property or an *in rem* proceeding against it. If the district court subsequently determines that it does not have personal jurisdiction over any petitioner, such petitioner will be free from the restraint of the injunction. The injunction, in other words, has none of the characteristics of an *in rem* seizure of property given by the remedy of attachment dealt with in Rule 64. Rule 64 is not a limitation upon the injunctive powers of district courts. Its purpose was to expand the remedies of seizure which federal district courts might exercise in proceedings at law. See Notes of Advisory Committee on Rules relating to Rule 64 and the predecessor of Rule 64, Sec. 915 of the Revised Statutes, 28 U. S. C. sec.

727. The flexible injunctive powers of a court of equity have never been cribbed or confined within the boundaries of categorical remedies, whether relating to seizure or not, and it is not to be assumed that Rule 64 intended so to confine these powers. Issuance of injunctions is governed and regulated by Rule 65 and the preliminary injunction in this case was sought and issued in accordance with this Rule.

If, as petitioners contend, Rule 64 limits the injunctive powers of district courts, it equally limits these powers when a court, pursuant to Rule 66, appoints a receiver to administer the estate of a debtor. It is familiar practice in receivership proceedings to issue an injunction restraining the defendant from disposing of his assets. It certainly would be a novel view that this constitutes an attachment and that it is therefore governed by Rule 64 and is permissible only within the limits within which attachment may issue under the law of the State in which the federal court is located.

But if New York law did control, by force of Rule 64, the grant of the injunction issued in this case, it would be not the law provided by the State attachment statutes (New York Civil Practice Act, §§ 902–973) but that provided by the injunction statutes (*ibid.*, §§ 876–901). Section 878 authorizes injunctions where, during the pendency of the action, defendant is violating or about to

violate plaintiff's rights or is removing or about to remove his property with intent to defraud the plaintiff. Section 877 authorizes issuance of injunctions "restraining the commission * * * of an act, the commission * * * of which during the pendency of the action would produce injury to the plaintiff." It is under the injunction statutes and not the attachment statutes that the New York courts exercise power to issue injunctions restraining defendant's removal or disposition of his assets. *Bronx County Trust Co.* v. *O'Connor*, 220 App. Div. 340 (1927); *Maine Products Co.* v. *Alexander*, 115 App. Div. 112 (1906); cf. *Bachman* v. *Harrington*, 184 N. Y. 458, 462 (1906).

The broad terms of the New York injunction statutes are ample basis for the power to enjoin as done in this case. The New York courts have used the injunctive power provided in § 878 for a comparable purpose. *Smith* v. *Bradlee*, 37 N. Y. S. 2d 512, 518–519 (1942).[12] The injunc-

[12] The decisions in New York cited by petitioners as denying injunctions did not deny the power to grant the relief sought but turned upon the absence in those cases of sufficient ground for granting the injunctive relief sought. These cases are *Wright Co.* v. *Aero Corp., Ltd.*, 128 N. Y. S. 726 (1911); *Campbell* v. *Ernest*, 64 Hun. 188 (1892); *Guth* v. *Groves* 44 F. Supp. 851 (S. D. N. Y., 1942); *Hunnewell* v. *N. Y. Central & H. R. R. Co.*, 196 Fed. 543 (C. C. S. D. N. Y., 1911); *Platt* v. *Elias*, 101 App. Div. 518 (1905). The case last cited was not followed in *Bronx County Trust Co.* v. *O'Connor*, *supra*, where an injunction was granted because the equities required it.

tion in this case may issue under the New York statute if New York law controls, as it otherwise may issue in the exercise of the court's own equity powers.

3. Petitioners in No. 1189 contend that the district court lacked power to issue the injunction until it had satisfied itself of its jurisdiction over them (Pet. 18.)[12] That court was of the opinion the question was not presented by the motion for preliminary injunction and postponed its consideration (R. 98, 100). We believe the district court was correct and it was entitled to issue an injunction protecting its jurisdiction prior to a determination of that issue. Cf. *United States* v. *Shipp*, 203 U. S. 563.

The facts of this case illustrate the appropriateness of such power in the interest of effective administration of justice. The petitioners had, prior to the hearing on the motion for preliminary injunction, moved to quash service of process upon them. No affidavit in support of the motion had been filed and the motion had not been noticed for hearing. Subsequent to the hearing on the motion for injunction, the Government filed an extensive affidavit in support of the allegations in its verified complaint that petitioners were doing business and could be found within

[12] Petitioners in No. 1190 do not make this contention. In the court below they urged postponement of a decision of the question of jurisdiction (R. 56, 62–67, 92).

the jurisdiction of the court (R. 6, 54).[14] Petitioners filed counter affidavits which controverted facts contained in the Government's affidavit. Under the practice prevailing in the court below the matter under such circumstances is referred to a Master to take testimony. The determination of this issue will require the analysis and evaluation by the Master and the court of numerous transactions and acts carried out in this country. If the issuance of the preliminary injunction was required to await this determination, the court could only have continued the restraining order, which would have imposed in the interim an identical restraint upon petitioners, or have terminated the restraining order, which would have deprived the Government of its remedy.

If this Court should hold the jurisdictional question must be decided prior to the entry of the preliminary injunction, a reversal of the order of the district court should continue in effect the temporary restraining order until the question

[14] This affidavit was filed prior to the decision on the motion for injunction in response to the request of the court, made at the hearing, to be informed whether there were in fact substantial grounds for the allegations of jurisdiction contained in the complaint. It stated facts going far beyond those this Court has held sufficient to support a finding of jurisdiction. *General Trading Co.* v. *State Tax Commission*, 322 U. S. 335; *International Harvester Co.* v. *Kentucky*, 234 U. S. 579, 583; *Commercial Mutual Accident Co.* v. *Davis*, 213 U. S. 245, 254; *St. Louis Southwestern Ry. Co.* v. *Alexander*, 227 U. S. 218.

of jurisdiction is determined. *Public Service Commission* v. *Wisconsin Telephone Co.*, 289 U. S. 67.

4. Petitioners in No. 1189 appear to contend that the district court was without power to issue the injunction because the complaint fails to state a cause of action (Pet. 18). While we believe that the question presented to the court by the motion for a preliminary injunction was whether the complaint raised serious questions under the Sherman and Wilson Tariff Acts (*Mayo* v. *Canning Co.*, 309 U. S. 310), it is not necessary to decide this question since it is clear that the complaint alleges a valid cause of action. It sets forth a combination by those controlling 95% of the total world production to restrain the import trade of the United States in gem and industrial diamonds and to maintain high prices for diamonds in this country. It alleges that the combination has had this as its primary purpose and its effect and that it has been carried out and made operative within the United States by numerous acts in furtherance thereof performed within this country. Such a combination violates the Sherman Act. *United States* v. *Pacific & Arctic Ry. & Navigation Co.*, 228 U. S. 87; *Thomsen* v. *Cayser*, 243 U. S. 66; *United States* v. *Sisal Sales Corp.*, 274 U. S. 268; *United States* v. *Aluminum Co. of America* (C. C. A. 2), No. 144, October Term 1944, decided March 12, 1945, pp. 1246–50.

B. IT WAS NOT AN ABUSE OF DISCRETION FOR THE DISTRICT COURT TO ISSUE THE INJUNCTION SINCE IT WAS REQUIRED TO PROTECT PLAINTIFF FROM IRREPARABLE INJURY THROUGH LOSS OF THE RIGHT TO EFFECTIVE RELIEF AND ITS INCONVENIENCE TO DEFENDANTS WAS SLIGHT

The district court adopted as its findings of fact the facts alleged in the complaint (R. 98, 100) and in addition found, as it stated in the order granting the preliminary injunction. (R. 100)

> * * * that defendants are foreign corporations and they could quickly withdraw their assets from the United States before the entry of a final decree in this cause; that if the preliminary injunction were denied, they would in all probability do so, ... which event, if the Government should succeed in establishing its cause, there would be no way to enforce the decree of the Court; and that the resulting damage to the Government would be incomparably greater than any damage to the corporate defendants if the preliminary injunction were granted; * * *

These findings are amply supported by the facts. Petitioners produce approximately 95% of the world production of diamonds (R. 11). Their principal market is in the United States (*ibid*). They have combined for the primary purpose of maintaining prices in this country (R. 21–22) and the effect of their combination is to maintain exorbitant prices and afford them extravagant

profit (R. 25). Petitioners have endeavored to conduct their businesses in such a way as to avoid subjecting themselves to the jurisdiction of the courts of the United States (R. 33). They are foreign corporations (R. 6–8). Their important officers reside abroad (R. 54, 58, 60). Substantially all of their assets are abroad (R. 54, 58, 61). Their assets in this country consist of bank accounts and personal property which could readily be removed. Petitioners owe no allegiance to our laws and a decree entered by the court could not be enforced outside the United States since, as a practical matter at least, the cause of action is not transitory. Under these circumstances extreme credulity would be required to assume that they would voluntarily obey a decree which would destroy their monopoly in the United States and would not quickly withdraw their assets from this country to prevent its enforcement.

The injunction does not apply to assets which the defendants may bring into this country subsequent to the date of the injunction. Any inconvenience or burden which the injunction may cause the defendants can be mitigated by a bond. Petitioners have not attempted to show that the cost of furnishing a bond would work any hardship upon them. That resulting damage to the Government would be incomparably greater if the injunction were denied than any damage to the corporate defendants if the preliminary injunction were granted is certain.

The issuance of the injunction on these findings was warranted by the decisions of this Court. *Prendergast* v. *New York Telephone Company*, 262 U. S. 43, 50, 51; *Ohio Oil Co.* v. *Conway*, 279 U. S. 813. In the latter case the Court said (p. 815):

> Where the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party will be certain and irreparable if the application be denied and the final decree be in his favor, while if the injunction be granted the injury to opposing party, even if the final decree be in his favor, will be inconsiderable, or may be adequately indemnified by a bond, the injunction usually will be granted.

CONCLUSION

For the reasons stated, the writs of certiorari should be dismissed. If, however, the Court should determine otherwise, we submit that the order under review should be affirmed.

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MAY 1945.

U. S. GOVERNMENT PRINTING OFFICE

SUPREME COURT OF THE UNITED STATES.

Nos. 1189, 1190.—October Term, 1944.

De Beers Consolidated Mines, Ltd., Diamond Corporation, Ltd., and Diamond Trading Company, Ltd., Petitioners,

1189 *vs.*

United States of America.

Societe Internationale Forestiere et Miniere du Congo and Companhia de Diamantes de Angola, Petitioners,

1190 *vs.*

United States of America.

On Writs of Certiorari to the District Court of the United States for the Southern District of New York.

[May 21, 1945.]

Mr. Justice Roberts delivered the opinion of the Court.

These cases come before the court on petitions for certiorari presented pursuant to § 262 of the Judicial Code.[1] Each petition is by several of the defendants in a single suit pending in the District Court.

Two matters are presented: the propriety of review of the action below by certiorari, and the alleged excess of jurisdiction by the court below in making the order of which the petitioners complain. An understanding of the issues requires a statement of the nature of the suit and of the order made.

The United States filed a complaint in the District Court against the three petitioners in No. 1189, which are corporations organized under the laws of South Africa; the petitioners in No. 1190, which are respectively corporations organized under the laws of the Belgian Congo and under the laws of Portugal; and four other corporations, one organized under the laws of Belgium, one under the laws of the Belgian Congo, and two under the laws of the United Kingdom of Great Britain and Northern Ireland, and seven individuals respectively characterized as stockholder, or stockholder and director, or stockholder and employee, or man-

[1] 28 U. S. C. § 377.

aging agent, or managing director of one or more of the corporations. The complaint sought equitable relief based upon a charge that the defendants were engaged in a conspiracy to restrain and monopolize the commerce of the United States with foreign nations in gem and industrial diamonds, in violation of §§ 1 and 2 of the Sherman Act[2] and § 73 of the Wilson Tariff Act.[3] The complaint alleged that all of the corporate defendants were doing business within the United States.

With the complaint the United States filed a motion for a preliminary injunction in which it prayed that all of the corporate defendants be restrained from withdrawing from the country any property located in the United States, and from selling, transferring or disposing of any property in the United States "until such time as this Court shall have determined the issues of this case and defendant corporations shall have complied with its orders." The reason given in support of the motion was:

"The injury to the United States of America from the withdrawal of said deposits, diamonds or other property would be irreparable because sequestration of said property is the only means of enforcing this Court's orders or decree against said foreign corporate defendants. The principal business of said defendants is carried on in foreign countries and they could quickly withdraw their assets from the United States and so prevent enforcement of any order or decree which this Court may render."

Amongst other supporting papers was an affidavit by counsel for the United States which stated that "the investigation which he has made shows the foreign corporate defendants named herein have endeavored to avoid subjecting themselves to the jurisdiction of the courts of the United States by making their sales abroad only and requiring customers to pay in advance for all purchases."

There was also a motion for a restraining order without notice. The requested restraining order was issued and served on a number of banks; one, a bank in which de Beers had, the same day, established a credit of $59,320; others in which Forestiere had credits of approximately $632,000. Bank credits of petitioner Diamantes affected aggregate approximately $47,000. Both the two last named petitioners had purchased machinery and sup-

[2] 26 Stat. 209 as amended 15 U. S. C. §§ 1, 2.
[3] 28 Stat. 570 as amended 15 U. S. C. § 8.

plies in the United States of an approximate value of $100,000, which were covered by the injunction. Upon a showing that as the corporate defendants were foreign corporations and would be required to obtain information and affidavits in support of their contention that service of process in the suit had not been made upon them, and in support of other motions addressed to failure to state a cause of action under the statutes, time to plead or answer was extended, and the injunction was from time to time modified and continued. Counsel for the petitioners, appearing specially, moved for dissolution of the injunction. The case was heard on affidavits and oral argument, the application was denied, and the injunction was continued in force. Thereupon the petitioners applied to this court for certiorari under § 262. That section provides in part:

"The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

All the petitioners attack the order as in substance a sequestration of property beyond the power of the court and an abuse of discretion in the circumstances. The petitioners in No. 1189 also seek a reversal on the ground that the complaint does not state a claim cognizable by United States courts and that the affidavits filed by these petitioners establish that the court below has no jurisdiction over the persons of the defendants. It is obvious from the record that these contentions are still open in the court below and that court has not yet passed upon them. In the view we take of the case it is unnecessary for us presently to consider them.

In *United States Alkali Export Association, Inc., et al.* v. *United States*, and *California Alkali Export Association, et al.* v. *United States*, Nos. 1016 and 1017 of this term, the court has discussed the propriety of review under § 262 in a suit brought under the Anti-Trust laws where there is a substantial question whether the District Court has jurisdiction of a suit which it has retained for trial on the merits. What is there said applies in this instance. If the preliminary injunction here granted, unless set aside, will stand throughout the course of the trial and for an indefinite period after its termination, and if the order was beyond the powers conferred upon the court, it is plain, under the decisions

mentioned, that the petitions present an appropriate case for the exercise of our jurisdiction under § 262. As hereafter noted the order in question was not made to grant interlocutory relief such as could be afforded by any final injunction, but is one respecting a matter lying wholly outside the issues in the case; no decision of the suit on the merits can redress any injury done by the order; and therefore unless it can be reviewed under § 262 it can never be corrected if beyond the power of the court below.[4] When Congress withholds interlocutory reviews, § 262 can, of course, not be availed of to correct a mere error in the exercise of conceded judicial power. But when a court has no judicial power to do what it purports to do—when its action is not mere error but usurpation of power—the situation falls precisely within the allowable use of § 262. We proceed, therefore, to inquire whether the District Court is empowered to enter the order under attack.

Although the Government based its motion upon the theory that the entry of the requested injunction would amount to a sequestration of the defendants' assets, and so argued in the court below, it has abandoned that position, because Rule 70 of the Rules of Civil Procedure,[5] which permits the issue of a writ of attachment or sequestration against the property of a disobedient party to compel satisfaction of a judgment, is operative only after a judgment is entered.

The Government disclaims any benefit of Rule 64, which provides for an attachment at the commencement of, or during the course of, an action for the purpose of securing payment of any judgment ultimately obtained, under and in accordance with the law of the state in which the court sits or under any existing federal statute. It is admitted that there is no applicable federal statute and that under the law of New York, an attachment may issue only in an action seeking a money judgment and will not issue in an equity suit such as the instant one.[6]

The court below deduced the power to grant the injunction from § 4 of the Sherman Act[7] and from § 262 of the Judicial

[4] See In re Chetwood, 165 U. S. 443, 462; Maryland v. Soper, 270 U. S. 9, 30.

[5] 28 U. S. C. foll. § 723c.

[6] N. Y. Civil Practice Act § 902; 7 Carmody, New York Practice, § 309; Thorington v. Merrick, 101 N. Y. 5; Brown v. The Chaminade, 176 Misc. 238; Avery v. Avery, 119 App. Div. 698. Compare Lazenby v. Codman, 28 F. Supp. 949; Shiel v. Patrick, 59 Fed. 962.

[7] 15 U. S. C. § 4.

Code, the section under which petitioners seek review in this court. The respondent seeks to sustain the injunction under the same statutory provisions.

Section 4 of the Sherman Act confers jurisdiction on District Courts "to prevent and restrain violations of this act." That jurisdiction, as we have held,[8] is to be exercised according to the general principles which govern the granting of equitable relief. Since it confers no new or different power than those traditionally exercised by courts of equity, we are remitted to examination of the practice of such courts, unless § 262 has enlarged those powers. That section empowers District Courts to issue all writs not specifically provided for by statute which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law. It turns out, therefore, that we are again remitted to an inquiry as to what is the usage, and what are the principles of equity applicable in such a case.

Preliminary to a discussion of the course of decision in chancery it will be well to note exactly what is the substance of the injunction, since the name given to the process is not determinative. In truth the purpose and effect of the injunction is to provide security for performance of a future order which may be entered by the court. Its issue presupposes or assumes the following things: (1) that the court has obtained jurisdiction of the persons of the defendants; (2) that it may be found and adjudged that the United States has stated a cause of action in its complaint; (3) that a decree may be entered after trial on the merits enjoining and restraining the defendants from certain future conduct; (4) that the defendants may disobey the decree entered; (5) that a proceeding may be instituted for contempt and will result adversely to the defendants; (6) that a fine may be imposed; (7) that the defendants may neglect or refuse to pay the fine; (8) that an execution issued for the collection of the fine pursuant to 18 U. S. C. 569 may be ineffectual to seize property or money of the defendants in liquidation of the fine, unless the moneys and properties covered by the injunction are held to await the event.

Under the Sherman Act and the Wilson Tariff Act, the District Court has no jurisdiction in this suit to enter a money judgment. Its only power is to restrain the future continuance of actions or conduct intended to monopolize or restrain commerce. It, of

[8] Appalachian Coals Inc. v. United States, 288 U. S. 344, 377.

course, has the power, pending final action in this respect, to restrain action or conduct violative of the statute. A preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally. The injunction in question is not of this character. It is not an injunction in the cause, and it deals with a matter lying wholly outside the issues in the suit. It deals with property which in no circumstances can be dealt with in any final injunction that may be entered. It is not a form of seizure of property used in offending against the statute for the property is not such as might be seized under § 6 of the Sherman Act,[9] or under § 76 of the Wilson Act,[10] and the complaint and affidavits do not purport so to charge. This process is, and can only be, sustained as a method of providing security for compliance with other process which conceivably may be issued for satisfaction of a money judgment for contempt.

The parties agree that neither of them can find any decision or text book authority for the requisition of such security on the footing of a complaint in equity. The respondent refers us to certain cases as analogous but, upon examination, they are all found to be cases in which an interlocutory injunction was granted with respect to a fund or property which would have been the subject of the provisions of any final decree in the cause,[11] or against action which would ultimately have been subject to injunction by final decree.[12] The Government also refers us to cases where federal courts have enjoined interference with their jurisdiction.[13] Thus it argues that a court of equity has inherent power to protect its jurisdiction. The fallacy in the application of the principle here is that, if service of the defendants is properly obtained, and if the complaint states a cause of action, no one questions the jurisdiction of the District Court to enter an appropriate injunction against future conduct violative of the

[9] 15 U. S. C. § 6.

[10] 15 U. S. C. § 11.

[11] Deckert v. Independence Corp., 311 U. S. 282.

[12] Looney v. Eastern Texas R. R. Co., 247 U. S. 214; Ohio Oil Co. v. Conway, 279 U. S. 813; Virginia Railway v. System Federation, 300 U. S. 515; Gibbs v. Buck, 307 U. S. 66.

[13] This power has often been exercised in cases where a court of equity has first taken jurisdiction of a *res* and where some other court has thereafter essayed to deal with that *res*. See, e.g. Wabash R. Co. v. Adelbert College, 208 U. S. 38, 45; Palmer v. Texas, 212 U. S. 118, 129, 130; Princess Lida v. Thompson, 305 U. S. 456, 467.

Anti-Trust Acts. The injunction here granted cannot aid or protect this exercise of its powers, and is not intended to do so.

Federal and State courts appear consistently to have refused relief of the nature here sought.[14] The Government nevertheless urges that equity should extend its jurisdiction for the purpose envisaged in the issue of the injunction and advances several reasons in support of its position. It suggests that, by analogy to the practice of issuing writs *ne exeat*,[15] the court, if it would restrain, by such a writ, an individual defendant in a similar case, should restrain the removal of the property of a corporate defendant from the jurisdiction. The analogy is not a helpful one, for the writ *ne exeat* would not be issued in a case of this sort where the defendant presently owes no debt to the complainant nor is under any fixed duty by reason of the receipt of moneys to account to the complainant therefor.[16]

The Government urges that the supposed hardship imposed upon the defendants by the entry of the injunction is exaggerated; that, by giving a bond, the defendants could release their moneys and property. To this there are several sufficient answers. If the court is without jurisdiction to demand security under the circumstances presented it is equally without authority to compel the proffer of a bond by the seizure of property. If the process be justified in the present posture of the case there is nothing to prevent other and further seizures of property or money brought into the United States in connection with transactions unrelated to any supposed violation of the Anti-Trust laws. Moreover, the very indefiniteness of the obligation, the remoteness of any possible exoneration of the surety, and the citizenship of the defendants would, as common experience tells us, require the posting of collateral with any bondsman, which would, in effect, tie up assets of value equal to that of those frozen by the injunction.

To sustain the challenged order would create a precedent of sweeping effect. This suit, as we have said, is not to be dis-

[14] Martin v. Berry Sons' Co., 83 F. 2d 857; Cities Service Co. v. McDowell, 13 Del. Ch. 109; Wahlgren v. Bausch & Lomb Optical Co., 77 F. 2d 121; Campbell v. Ernest, 19 N. Y. Supp. 123; Platt v. Elias, 101 App. Div. (N. Y.) 518; Maine v. Alexander, 115 App. Div. (N. Y.) 112; Golden v. Tauster, 125 N. Y. Supp. 83; Wright Co. v. Aero Corp., 128 N. Y. Supp. 726; Broadfoot v. Miller, 174 N. Y. Supp. 497; compare Gordon v. Washington, 295 U. S. 30, 37.

[15] See 28 U. S. C. § 376.

[16] Ginsberg & Sons v. Popkin, 285 U. S. 204, 208.

tinguished from any other suit in equity. What applies to it applies to all such. Every suitor who resorts to chancery for any sort of relief by injunction may, on a mere statement of belief that the defendant can easily make away with or transport his money or goods, impose an injunction on him, indefinite in duration, disabling him to use so much of his funds or property as the court deems necessary for security or compliance with its possible decree. And, if so, it is difficult to see why a plaintiff in any action for a personal judgment in tort or contract may not, also, apply to the chancellor for a so-called injunction sequestrating his opponent's assets pending recovery and satisfaction of a judgment in such a law action. No relief of this character has been thought justified in the long history of equity jurisprudence.

We are of opinion that the injunction issued in this case is not authorized either by statute or by the usages of equity and that the decree granting the injunction should be reversed.

Mr. Justice DOUGLAS, with whom Mr. Justice BLACK, Mr. Justice MURPHY and Mr. Justice RUTLEDGE concur, dissenting.

I think the writ should be dismissed. For I do not think this is a proper case in which to exercise our jurisdiction under § 262 of the Judicial Code, 28 U. S. C. § 377.

Our jurisdiction under § 262 has been fully reviewed by the Chief Justice in *U. S. Alkali Export Ass'n Inc. v. United States*, decided this day. I agree that the exercise of our extraordinary jurisdiction was appropriate in that case. For the question presented not only went to the jurisdiction of the District Court to entertain the suit. If the defendants in that suit were right in their contention, a trial on the merits would have frustrated the statutory scheme which Congress had designed for the control of anti-trust activities.

But there is no such extraordinary situation presented here. This is precisely the kind of decree which Congress by the Expediting Act of February 11, 1903, as amended, 15 U. S. C. § 29, intended should not be brought here for review. With reference to the change made by that Act, Mr. Justice Brandeis speaking for the Court in *United States v. California Cooperative Canneries*, 279 U. S. 553, 558, said: "These provisions governing ap-

peals in general were amended by the Expediting Act so that in suits in equity under the Anti-Trust Act 'in which the United States is complainant,' the appeal should be direct to this Court from the final decree in the trial court. Thus, Congress limited the right of review to an appeal from the decree which disposed of all matters, see *Collins* v. *Miller*, 252 U. S. 364; and it precluded the possibility of an appeal to either court from an interlocutory decree."

To allow this appeal is to defeat that policy. Long ago in *Bank of Columbia* v. *Sweeney*, 1 Pet. 567, 569, Chief Justice Marshall stated that an allowance of an appeal from an interlocutory ruling where Congress permitted an appeal only from a final judgment would be a "plain evasion" of the Act of Congress. We made a like ruling only recently in *Roche* v. *Evaporated Milk Ass'n*, 319 U. S. 21, 30, where we said: "Where the appeal statutes establish the conditions of appellate review, an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions and thwart the Congressional policy against piecemeal appeals in criminal cases."

The present case presents no issue which warrants a departure from that long settled practice. This case raises no question of grave public importance. It is by no means comparable to *Ex parte United States*, 287 U. S. 241, where the interlocutory decree was equivalent to a denial of the absolute right of the government to put the accused on trial. It is wholly unlike the cases cited in *U. S. Alkali Export Ass'n Inc.* v. *United States*, *supra*, where writs were issued under § 262, to review interlocutory orders which foreclosed the adjudication of rights entrusted to the jurisdiction of a state tribunal or which deprived a party of his basic right of trial by jury. The public importance of the present question is not apparent. The actual hardship imposed upon the defendants is no more than the cost of procuring a bond. It has always been assumed that mere hardship or inconvenience alone was not sufficient to justify resort to the extraordinary course of review by way of § 262. *U. S. Alkali Export Ass'n Inc.* v. *United States*, *supra*. Is the inconvenience of private litigants to be the newly found ground for evading the Expediting Act?

The reason advanced for departing from the long standing practice is that "the order was beyond the powers conferred upon

"the court." By that test every interlocutory order which is wrong can be reviewed here under § 262. That is novel doctrine. That seems to be the test for the Court says that the order can now be reviewed because it involves "a matter lying wholly outside the issues in the case." In other words, we look to the merits and take the case under § 262 if it appears that the District Court exceeded its authority. But it always exceeds its authority when it abuses its discretion. Thus we must now entertain these appeals on interlocutory orders, though Congress said we should not, in order to determine whether the District Court kept within bounds. Certainly Congress knew that some interlocutory orders might be erroneous when it chose to make them non-reviewable. It did not draw the distinction now suggested between interlocutory orders which are an abuse of conceded judicial power and interlocutory orders which otherwise exceed judicial authority. Congress moreover knew that if immediate review of interlocutory orders could not be had, no decision on the merits might be able to "redress any injury done by the order". But that was the choice which it made. We should respect it.

The decision, if followed, will open the flood gates to review of interlocutory decrees. It circumvents the policy of Congress to restrict review in these cases to final judgments.